90-674

NO.

In the Supreme Court of the United States

OCTOBER TERM 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, WILLARD CARLOCK, SR., PETER BABIN III, DON SCHIRO AND C.J. LAIRD

Petitioners

VERSUS

ROBERT GUIDRY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a union member's rights secured by Section 101(a)(1) and (2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(1) and (2), are "infringed" within the meaning of §102 of the LMRDA, 29 U.S.C. §412, by the discriminatory operation of a union's hiring hall, where the right to be referred to employment is not an incident of union membership.

2) Whether the LMRDA authorizes an award of punitive damages to a prevailing plaintiff.

3) Whether the LMRDA authorizes an award of damages for emotional distress and if so, what type of evidence will constitute a sufficient basis for the awarding of such damages.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, WILLARD CARLOCK, SR., PETER BABIN, III, DON SCHIRO AND C.J. LAIRD

Petitioners

VERSUS

ROBERT GUIDRY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, International Union of Operating Engineers, Local 406 ("the Union"), Willard Carlock, Sr., Peter Babin, III, Don Schiro and C.J. Laird, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit on the question presented.

I. OPINIONS BELOW

This petition arises from the opinion of the Court of Appeals for the Fifth Circuit granting Guidry's petition for panel rehearing, which is reported at 907 F.2d 1491.(A1).[1]

[1] References to the Appendix will be "A-____."

The court of appeals' decision on remand from this court (493 U.S. ____, 110 S.Ct. 1465) (A9) is reported at 902 F.2d 335 (1990) (A6). The initial opinion of the court of appeals is reported at 882 F.2d 929 (1989) (A10). The district court's opinion is reported at 669 F.Supp. 763 (W.D.La. 1987). (A42).

II. JURISDICTION

On July 25, 1990, the Court of Appeals granted Guidry's petition for panel rehearing and issued its opinion on rehearing. This petition is filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

III. STATEMENT OF STATUTES INVOLVED

The questions presented for review involves Sections 101 (a)(1) and (2) and 102 of the Labor-Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C. §§411 (a)(1) and (2) and 412, the text of which are set forth in the appendix hereto.

IV. STATEMENT OF THE CASE

Robert Guidry was a member of the Union, which is a state-wide union with six district offices, including one located in Lake Charles, Louisiana. Pursuant to various collective bargaining agreements, the Union operates hiring halls at its main office in New Orleans and district offices, through which it refers both members and non-members of the Union to construction employment. The Union maintains out-of-work lists at its offices of individuals who wish to be referred to jobs. The lists contain names in the order applicants notify the Union he or she is available for work. In Louisiana, it is unlawful to condition

employment upon union membership, or the payment of an agency-fee.

Guidry had a history of opposing incumbent Union officers, including Carlock and Laird, the business agents appointed to operate the Lake Charles district office and its hiring hall. Guidry sought employment through the Lake Charles hiring hall. Carlock "exploited and, at times, disregarded entirely the hiring hall procedures to enrich his confederates to the detriment" of Guidry (A53). The district court concluded that "manipulation of hiring hall procedures to suppress participation in union activities and opposition to union management and policies constitutes violations of §411(a)(1) and (2)." (A72).

The Court of Appeals affirmed substantially all of the district court's holdings. It concluded that discipline within the meaning of sections 101(a)(5) and 609 had occurred because "Guidry's name was repeatedly skipped over on the out-of-work list in retaliation for his outspoken opposition to Union leadership" (A32).

After denial of rehearing, the Union petitioned this court for a writ of certiorari, which was granted (A9). The Fifth Circuit's judgment was vacated summarily and remanded for reconsideration in light of *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. ___(1989).

On remand, the Fifth Circuit directed the district court to determine "whether, and to what extent" the Union as an entity was responsible for the hiring hall discrimination against Guidry. (A7,8).

Guidry petitioned for panel rehearing and rehearing en banc. The Fifth Circuit granted the petition for panel rehearing, concluding that "*Breininger* does not alter the

district court's judgment regarding the defendants' violations of Guidry's equal rights under Section 101(a)(1) and right to free speech under Section 101(a)(2). A litigant may successfully seek redress under Section 102 for an infringement of these LMRDA right even if no unlawful 'discipline' is shown." (A4).[2] It remanded to the district court for consideration of damages based upon its earlier finding that the district court applied an incorrect statute of limitations period, and to permit Guidry to press his §101(a)(5) claim if he so desired. (A2,4).

V. JURISDICTION OF THE DISTRICT COURT

Jurisdiction in the district court, the United States District Court for the Western District of Louisiana, Lake Charles Division, was based upon sections 101 and 609 of the LMRDA, 29 U.S.C.§§411 and 529.

VI. REASONS FOR GRANTING THE WRIT

A. HIRING HALL DISCRIMINATION IS NOT ACTIONABLE UNDER TITLE I OF THE LMRDA

In *Breininger,* 110 S.Ct. 424, this court, in concluding that the discriminatory operation of a hiring hall does not constitute "discipline" under Sections 101(a)(5) and 609 of the LMRDA (29 U.S.C. §§411(a)(5) and 529), did not pass upon the petitioner's claim "that certain of his rights secured by the LMRDA were 'infringed' by respond-

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[2] F.R.App.P. 35(b) and Fifth Circuit Rule 35.3 prohibit the submission of a brief in opposition to a petition for panel or en banc rehearing, unless requested by the court. The court did not solicit a position from the Union prior to granting the petition for rehearing and issuing its decision.

ent's conduct, in violation of Section 102" because the claim had not been litigated by the courts below. 110 S.Ct. at 440 n.28. This open question is squarely presented by this case. Because litigation over the operation of hiring halls is recurring in every circuit, and in the past has proceeded under allegations that such conduct violates, *inter alia*, Section 101(a)(5), the extant question is appropriately resolved at this time.[3]

Section 102 "provides independent authority for a suit against a union based on an alleged violation of Title I of the Act." *Finnegan v. Leu*, 456 U.S. 431, 439 (1982). Section 102 protects "rights secured by the provisions" of Title I which "have been infringed." "[A] litigant may maintain an action under §102 — to redress an 'infringement' of 'rights secured' under Title I — without necessarily stating a violation of §609." *Finnegan*, 456 U.S. at 439.[4]

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[3] Prior to the Court's decision in *Breininger*, most courts of appeals considered that employment-related reprisals, such as hiring hall discrimination, constituted discipline under Section 101(a)(5), as did the court of appeals in the present matter, without considering whether a cause of action existed under §102. *See Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 122-123 (6th Cir. 1985), *cert. denied* 475 U.S. 1017 (1986); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1378-79 (8th Cir. 1978); *Duncan v. Peninsula Shipbuilders Association*, 394 F.2d 237, 239 (4th Cir. 1968); *Moore v. Electrical Workers Local 569*, 653 F.Supp. 767, 769-72 (N.D. Cal. 1987). Only the *Murphy* court considered the issue, and, reading §101(a)(1) and (2) more broadly than §609, concluded they created such a cause of action, because it constituted "indirect interference" with Title I rights. 774 F.2d at 123. Petitioners submit this holding overreaches the narrower scope of §102, as shown above.

[4] The phrase "otherwise discipline" which appears in both Sections 101(a)(5) and 609 have the same meaning. *Breininger*, 110 S.Ct. at 438 n.23, citing *Finnegan*, 456 U.S. at 439 n.9. The court interpreted the term "discipline" to mean only punishment authorized by a union as a collective entity to enforce its rules undertaken under color of the union's

Section 609 "applies to disciplinary action taken in retaliation for the exercise of *any* right secured under the Act, where as §102 protects only rights secured by Title I." (emphasis in original). *Finnegan,* 456 U.S. at 439 n.10. The scope of Section 102, and the statutory term "infringes," in Section 102 is indisputably narrower in scope than Section 609. *Allen v. Allied Plant Maintenance Company of Tennessee,* 636 F.Supp. 1090, 1097 (M.D. Tenn. 1986) (alleged employment related reprisal for dissident union activity is not actionable under Section 101(a)(2), because plaintiff is not deprived of any privilege or benefit incident to union membership).

Because of the often ambiguous and at time unenlightening legislative history of the LMRDA, *see Wirtz v. Glass Bottle Blowers, Local 153,* 389 U.S. 463, 468 (1968), courts will often look at the underlying rationale of the statute for aid in rendering an interpretation. *See Finnegan,* 456 U.S. at 435-36; *Wirtz,* 389 U.S. 468 n.6. Sections 101 and 102 were intended to prevent sanctions "which in many instances" could mean "loss of union membership *and in turn loss of livelihood.*" (emphasis supplied.) *Finnegan,* 456 U.S. at 435. Thus, *inter alia,* the concern addressed was a direct sanction against the member, which affected his status as a member, which "in turn" might result in "loss of livelihood." It did not, however, implicate the ad hoc use of a hiring hall by a business manager, which infringes upon a member's employment status, *Allen,* 636 F.Supp. at 1097, but not his status as a member.[5]

Footnote 4 continued.
right to control the member's conduct "rather than ad hoc retaliation by individual union officers." 110 S.Ct. at 439, 440 and n.15.

[5] This overriding distinction has been recognized by two courts of appeal, albeit in the context of alleged violations of Sections 101(a)(5) and

Nor does this Court's recent decision in *Sheet Metal Workers v. Lynn*, 109 S.Ct. 639 (1989), compel the conclusion that the discriminatory operation of a hiring hall states a cause of action under the LMRDA. There, the removal of a union officer because of his opposition to the international union's actions was found to violate Title I because it affected his status as a member — i.e., although his status *as a member* permitted him to hold union office, his opposition resulted in the infringement of his right as a member to hold union office. Moreover, the officer's removal impacted directly on the membership's Title I right to be represented by their duly elected representative. Thus, the retaliatory action affected membership status and infringed upon a right or benefit incident to union membership, unlike referral through a hiring hall.

Here, the Fifth Circuit reinstated its earlier affirmance of the district court that the hiring hall discrimination violated §101(a)(1) and (2) and §102, with the conclusory assertion that it created such a cause of action. But Guidry's status as a member, and his rights a member secured by Title I were not affected by the discriminatory operation of the referral system. He remained free to vote in all elections, to speak freely as he had always done, and to receive all benefits incident to his membership.

Footnote 5 continued.

609. *Turner v. Boilermakers Local 455*, 755 F.2d 866, 869-70 (11th Cir. 1985); *Hackenburg v. Boilermakers*, 694 F.2d 1237, 1239 (10th Cir. 1982). Referral through a hiring hall is not benefit incident to union membership. *Turner*, 755 F.2d at 869; *Hackenburg*, 694 F.2d at 1237, and, of course, employment itself is not a benefit incident to union membership. *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963); *NLRB v General Motors Corporation*, 373 U.S. 734 (1963) (explaining interplay between Section 8(a)(3) and Section 14(b) of the Labor Management Relations Act, 29 U.S.C. §§158(a)(3) and 164(b)).

Although Title I does not provide a cause of action to a member affected by the discriminatory operation of the hiring hall, the member is not left without a means to vindicate his rights. *Breininger* made clear that the affected individual has a private cause of action under Section 301 of the LMRA, 29 U.S.C. §185, in addition to relief before the National Labor Relations Board for a violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A). 110 S.Ct. at 436.

B. THE AWARD OF PUNITIVE DAMAGES UNDER THE LMRDA CONFLICTS WITH RECENT DECISIONS OF THIS COURT CONCERNING RELATED STATUTES, AND IMPOSES THE RISK ON UNION MEMBERS OF THEIR UNION BEING CRIPPLED BY SUCH AN AWARD

The Court of Appeals reinstated its prior damage award on remand. In its initial decision (A10), relying on its precedent, the Fifth Circuit affirmed the award of punitive damages under the LMRDA against the Union and Babin. *Parker v. Steelworkers Local 1466,* 642 F.2d 104 (5th Cir. 1981) and *Boilermakers v. Braswell,* 388 F.2d 193 (5th Cir.), *cert. denied,* 391 U.S. 935 (1968). *Parker* and *Braswell,* hold that where a union acts with actual malice or reckless or wanton indifference to the rights of a plaintiff, punitive damages may be awarded. The award of punitives against the Union stemmed from the ad hoc actions of Carlock and Laird, primarily the operation of the hiring hall and income lost thereby. Babin was sanctioned for failing to monitor adequately the actions of Carlock and Laird.

The LMRDA is silent on awards of punitive damages. However, in *International Bhd. of Electrical Workers v. Foust,* 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979), the court held that punitive damages could not

be assessed under section 301 of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. §185, against a union which breaches its duty of fair representation, whether the action flowed from the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, or the Railway Labor Act, 45 U.S.C. § 151 *et seq.* In rejecting the argument that punitive damages are appropriate under section 301 because "actual damages caused by a union's failure to pursue grievances may be *de minimis*" and therefore "a strong legal remedy is essential to . . . inhibit union misconduct," *id.*, 442 U.S. at 48, 99 S.Ct. at 2126, the court concluded that punitive damage awards "could unsettle the careful balance of individual and collective interests . . . . in the unfair representation area." *id.* Punitive damages may result in windfall recoveries for plaintiffs with little actual damages, and "such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is too great a price for whatever deterrent effect punitive damages may have." *id.*, 442 U.S. at 50-51, 99 S.Ct. at 2127. This rationale applies with equal force to suits brought under the LMRDA, *Foust*, 442 U.S. at 59, 99 S.Ct. 2131 (Blackmun, J. concurring in the result, with whom Burger, C.J., and Rehnquist and Stevens, J.J., joined).

Noting the LMRDA's silence on punitive damages, the Fifth Circuit discovered that there is "nothing in the legislative history of the LMRDA which touches directly on this question." *Braswell*, 388 F.2d at 200. The absence of a statutory provision authorizing a plaintiff to recover punitive damages or, *inter alia*, of any legislative history indicating Congress intended to create a private right of action for punitive damages, lead this court to conclude that punitive damages were not available under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. §1001 *et seq. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144-146, 148, 105 S.Ct. 3085, 3091-93, 87 L.Ed. 2d 96 (1985). The remedial provision of the LMRDA, section 102, is similar to ERISA's remedial provision for breaches of fiduciary duties to plan participants, 29 U.S.C. §1109.

Similar results were reached in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940) (holding the NLRB could not assess punitive damages as it was not expressly authorized to do so by Congress), and *Teamsters v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (holding punitive damages could not be recovered under section 303 of the LMRA, 29 U.S.C. §187, for a union's impermissible secondary boycott). Because the remedial provisions of Title VII of the Civil Rights Act of 1964 are patterned after the NLRA, *Ablemarle Paper Company v. Moody*, 422 U.S. 405, 419, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), it appears punitive damages are not available under Title VII.[6]

Although the Fifth Circuit has stated that Congress' declaration of the purpose of LMRDA — "to eliminate or prevent improper practices on the part of labor organizations" — justified the award of punitive damages, *Braswell*, 388 F.2d at 200, ERISA was also enacted to curb abuses affecting employees — *inter alia*, the termination of pension plans by employers which disenfranchised employees from their expected pensions. *See PBGC v. R.A. Gray Co.*, 467 U.S. 717, 720-21, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984); *Alessi v. Raybestos-Manhattan, Inc.*,

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[6] Compare the Fair Labor Standards Act, 29 U.S.C. §§216 and 217, which authorizes liquidated damages, incorporated into the Age Discrimination in Employment Act, 29 U.S.C. §626(b).

401 U.S. 504, 510-11, 101 S.Ct. 1895, 1899-1900, 68 L.Ed.2d 402 (1981).[7]

Whether punitive damages are available under the LMRDA has a far reaching impact upon labor organizations. Punitive damages may be awarded by juries "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . . Community hostility toward unions, management or minority views can thus find expression in punitive awards." *Foust*, 442 U.S. 50 n.14, 99 S.Ct. 2127 n.14.[8] The issue is an important question of federal law which was not decided by *Foust*, 442 U.S. at 47 n.9, 99 S.Ct. 2125 n.9, and which should now be settled by the court.[9]

C. THE LMRDA DOES NOT AUTHORIZE AN AWARD OF DAMAGES FOR EMOTIONAL DISTRESS

Presented with an issue of first impression for the

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[7] Union officers have fiduciary duties to the membership similar to the duties imposed upon ERISA trustees, under section 501 of the LMRDA, 29 U.S.C. §501. *See Bloom v. Teamsters*, 752 F.2d 1312 (9th Cir. 1984).

[8] Alleged violations of sections 101 and 102 have been tried to juries, as have damages issues. *See, e.g., Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373 (8th Cir. 1978); *Keene v. Operating Engineers Local 624*, 569 F.2d. 1375 (5th Cir. 1978).

[9] Although most courts of appeals reaching this issue have found punitive damages appropriate under the LMRDA, *Braswell*, 388 F.2d 193; *Cook v. Orange Belt Dist. Council*, 529 F.2d 815 (9th Cir. 1976); *Morrissey v. NMU*, 544 F.2d 19 (2d Cir. 1976), the Sixth Circuit has questioned the availability of such damages. *McGraw v. Plumbers and Pipefitters*, 341 F.2d 705 (6th Cir. 1965). The courts of appeals were also virtually unanimous in finding punitive damages available under the LMRA, which this court rejected in *Foust*, 442 U.S. at 58, 99 S.Ct. at 2131 (Blackmun, J., concurring in the result).

Fifth Circuit, the Court of Appeals, relying on precedent of other courts of appeal, summarily concluded that damages for emotional distress are recoverable under the LMRDA. (A37). It imposed a broad "actual injury" requirement, which allows "lost wages as well as physical manifestations of emotional distress [to] serve[ ] as sufficient indication of actual injury." (A38, 39). The district court awarded such damages based upon lost wages only; i.e., those wages lost through the discriminatory operation of the hiring hall. (A39, 77).

Petitioners submit damages for emotional distress are not recoverable under the LMRDA. Section 102 of the LMRDA, 29 U.S.C. §412, provides in pertinent part:

> Any person whose rights secured by the provcisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in the district court of the United States for *such relief* (including injunctions) *as may be appropriate.* (emphasis added).

The statute is silent on the award of emotional distress. In the seminal case on this issue, *Boilermakers v. Rafferty,* 348 F.2d 307 (9th Cir. 1965), the court of appeals noted that the only item of legislative history pertinent to the issue is a remark by Senator Goldwater:

> Although the Bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the Bill does not grant him, even where successful in his suit, reasonable counsel fee or other costs.

2 Leg. History, LMRDA 1281.

In *Russell*, 473 U.S. at 138-139, 146, 105 S.Ct. at 3088-89, 3092, the court found that similar language in section 409(a) of ERISA, 29 U.S.C. §1109 (a), did not authorize "extra -contractual" damages, such as punitive damages and emotional distress.[10] The Court of Appeals has held that Title VII of the Civil Rights Act of 1964 does not permit recovery for emotional distress damages, even though the statute authorizes the court "to order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988). *Accord, Shah v. Mt. Zion Hospital*, 642 F.2d 268 (9th Cir. 1981); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *DeGrace v. Rumsfield*, 614 F.2d 796 (1st Cir. 1980). *Contra Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267 (8th Cir. 1981).

In *Farmer v. Carpenters Local 25*, 430 U.S. 290, 305-06, 97 S.Ct. 1056, 1066, 51 L.Ed.2d 338 (1977), the court found that in certain circumstances, a state cause of action against a union for intentional infliction of emotional distress is not preempted by the National Labor Relations Act. It emphasized, however, that this cause of action "cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which

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[10] Section 409(a) subjects a fiduciary who breaches his duty to the plan "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . .Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id.*, 430 U.S. at 305, 97 S.Ct. at 1066. The principles enunciated in *Russell, Farmer,* and by the majority of the courts of appeals concerning Title VII, are equally applicable to the LMRDA. The LMRDA, like ERISA and Title VII, does not expressly authorize recovery of damages for emotional distress, and its legislative history is virtually silent on the issue. The same construction is warranted for the LMRDA. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. . . The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Russel,* 473 U.S. at 147, 105 S.Ct. at 3093.

Just as with punitive damages, this issue is worthy of resolution by the court because of its potential for significant impact upon union coffers. As noted *supra,* LMRDA claims are often tried to a jury. A jury by imposition of such an award may, as the Court of Appeals noted, deprive other union members of effective representation. (A37).

Moreover, with respect to proof of injury, there is a split between the circuit courts of appeals. The Courts of Appeals for the Fifth and Ninth Circuits do not require proof of a physical manifestation of emotional distress; they require only a showing of lost wages and essentially infer emotional distress. (A38,39). The Court of Appeals for

the Second Circuit requires a showing of a physical manifestation of injury, "based upon the plaintiff's physical condition or medical evidence." *Rodonich v. House Wrecker's Union Local 95*, 817 F.2d 967, 978 (2d Cir. 1987). Loss of income alone is insufficient in the Second Circuit's view to support damages for emotional distress because of the potential impact on a union's treasury occasioned by damages for emotional distress where no actual injury to the plaintiff has occurred. 817 F.2d at 977-78.

VII. CONCLUSION

Based upon the foregoing, a writ of certiorari to the Court of Appeals for the Fifth Circuit is warranted.

Respectfully submitted,

Jerry L. Gardner, Jr.*
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Counsel for Petitioners

*Counsel of Record

October 23, 1990

(2)

NO. 90-674

In the
Supreme Court of the United States

OCTOBER TERM 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, WILLARD CARLOCK, SR., PETER BABIN III, DON SCHIRO AND C.J. LAIRD

Petitioners

VERSUS

ROBERT GUIDRY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
JUL 25 1990

No. 87-4733

ROBERT GUIDRY,

Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL.,

Defendants-Appellants, Cross-Appellees.

On Remand From the Supreme Court of the United States

(July 25, 1990)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 22, 1990, 5th Cir., 1990 ___ F.2d ___)

Before RUBIN, GARZA and KING, Circuit Judges.

PER CURIAM:

In our opinion dated August 29, 1989, this court affirmed a district court judgment in favor of plaintiff Robert Guidry (Guidry) as to the liability of the International Union of Operating Engineers, Local 406 and former and current Union leaders (the defendants) for violations of the Labor Management Relations Act (LMRA), 29 U.S.C. § 159(a), and the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 411(a)(1), (2), (5), and 529. *Guidry v. International Union of Operating Engineers, Local 406,* 882 F.2d 929 (5th Cir. 1989), *vacated,* ___ U.S. ___, 110 S. Ct. 1465 (1990). We remanded, however, for a reassessment of damages. *Id.* at 941-45. The Supreme Court subsequently vacated our judgment and remanded for further consideration in light of its decision in *Breininger v. Sheet Metal Workers International Association Local Union No. 6,* ___ U.S. ___, 110 S. Ct. 424 (1989), a case that addressed the issue of whether hiring hall discrimination constituted "discipline" within the meaning of sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. §§ 411(a)(5), 529. We, in turn, remanded to the district court for further proceedings in light of *Breininger,* to the extent that *Breininger* affected our panel's prior opinion. *Guidry,* 902 F.2d 335 (1990). Of course, for the reasons explained in our prior opinion, a remand to the district court was necessary, in any event, to reassess Guidry's damages. *See Guidry,* 882 F.2d at 941-45 (holding that actual and punitive damages based on Guidry's LMRDA claims should be reassessed under a one-year limitations period).

Guidry now petitions this court for panel rehearing and for rehearing en banc. Guidry argues that a remand on the liability issue is required only as to those claims potentially affected by the *Breininger* decision — i.e., those

claims based on sections 101(a)(5) and 609 of the LMRDA[1] — and that our mandate erroneously instructs the district court to make new determinations of liability on all of his claims. He contends that *Breininger* in no way impacts the district court's finding of liability based on the defendants' breach of the duty of fair representation under the LMRA, 29 U.S.C. § 159(a). He also argues that the district court's finding of liability under the LMRDA may be affirmed on the alternative grounds of Guidry's LMRDA equal rights anad free speech claims, 29 U.S.C. §§ 411(a)(1), (2) — theories of recovery that were not addressed by the Supreme Court in *Breininger,* and that are not affected by the Court's decision in that case.

Having considered Guidry's motion for rehearing, we conclude that his complaint is well taken, Although it was not our intention to require the district court to reevaluate the defendants' liability for breach of the duty of fair representation, 29 U.S.C. § 159(a), or for violation of Guidry's rights to equal union member rights and free speech, 29 U.S.C. §§ 411(a)(5), 529, we admit that our mandate is not completely clear on this point. We therefore modify our prior order, 902 F.2d 335, by deleting the last full paragraph and substituting in its place the following four paragraphs:

> The Supreme Court's interpretation of the phrase "otherwise discipline" in determining whether hiring hall discrimination gives rise to a claim under sections 101(a)(5) and 609 of the

---

[1] Guidry correctly notes that the Supreme Court's holding reagarding a plaintiff's burden of pleading and proof under the LMRDA looks only to sections 101(a)(5) and 609 of the Act, 29 U.S.C. §§ 411(a)(5), 529, and is based on its construction of the term "discipline" contained in those sections.

LMRDA does not affect that portion of our panel opinion affirming liability and damages based on Guidry's claim that the Union breached its duty of fair representation under the Labor Management Relations Act, 29 U.S.C. § 159(a). *See Guidry*, 882 F.2d at 937 & n.5. Therefore, this portion of our prior opinion is reinstated.

On the issue of LMRDA liability, we need remand only with respect to those claims potentially impacted by the Supreme Court's decision in *Breininger*, that is, Guidry's unlawful discipline claims based on sections 101(a)(5) and 609 of the Act.[2] *Breininger* does not alter the district court's judgment regarding the defendants' violations of Guidry's equal rights under section 101(a)(1) and right to free speech under section 101(a)(2). A litigant may successfully seek redress under section 102 for an infringement of these LMRDA rights even if no unlawful "discipline" is shown. *Finnegan v. Leu*, 456 U.S. 431, 439 (1982); *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114, 122 (6th cir. 1985), *cert. denied*, 475 U.S. 1017 (1986).

If Guidry wishes to pursue his unlawful discipline claims on remand, the district court must determine, in view of *Breininger*, whether the Union as a collective entity was responsible for hiring hall discrimination against him. the court should make new findings, taking additional evidence if needed, and render its judgment accordingly.

---

[2] Guidry's expulsion and the district court's reinstatement of Guidry to the Union are not at issue as expulsion is explicitly set out in the LMRDA as a form of discipline. *See* 29 U.S.C. §§ 411(a)(5), 529.

In our previous opinion in this case, we vacated the district court's award of LMRDA damages, holding that, due to an intervening Supreme Court case, *Reed v. United Transportation Union*, 488 U.S. 319 (1989), the district court erred in applying a six-month statute of limitations to Guidry's LMRDA claims. *See Guidry*, 882 F.2d at 941-42. We remended for a redetermination of damages based on violations occurring within one year of filing suit, applying Louisiana's one-year limitations period for delictual actions. *Id.* at 941-45. this holding is unaffected by *Breininger*, and we therefore remand for a reassessment of damages consistent with the discussion contained in our previous opinion. *Id.*

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4733

ROBERT GUIDRY,

Plaintiff-Appellee
Cross-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL.,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(May 22, 1990)

On Remand from the Supreme Court of the United States

Before RUBIN, GARZA and King, Circuit Judges.

PER CURIAM:

On March 19, 1990, the Supreme Court vacated our judgment in *Guidry v. International Union of Operating Engineers*, 882 F.2d 929 (5th Cir. 1989), and remended for further proceedings in light of *Breininger v. Sheet Metal Workers International Association*, 110 S. Ct. 424 (1989). We, in turn, remand to the district court.

In *Breininger*, the court held that the phrase "otherwise discipline" under sections 101(a)(5) and 609 of the Labor Management Reporting and Disclosures Act of 1959 (LMRDA) denotes only that punishment "authorized by the union as a collective entity to enforce its rules." *Id.* at 439. In other words, an action must be "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership." *Id.* (*quoting Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976)). The union need not, however, invoke formal proceedings, and discipline can entail informal or summary penalties as long as adverse action against a union member is not purely "ad hoc retaliation by individual union officers." *Id.* at 439 n.15. "Discipline 'must be done in the name of or on behalf of the union as an organizational entity.' " *Id.* The petitioner in *Breininger* "alleged only that [certain union officers] failed to refer him to employment because he supported one of their political rivals." *Id.* at 440. Thus, the petitioner failed to allege acts constituting discipline by the union as a collective entity.

On remand, the district court must determine, in view of *Breininger*, whether , and to what extent, the Union as a collective entity was responsible for hiring hall

discrimination against Guidry.[1] In making that determination, the court may, in its discretion, take additional evidence. Damages should be assessed only for those injuries caused Guidry by action authorized by the Union as a collective entity. The Court should make new findings and render its judgment accordingly.

REMANDED.

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[1] Guidry's expulsion and the district court's reinstatement of Guidry to the Union are not at issue as expulsion is explicitly set out in the LMRDA as a form of discipline.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 19, 1990

Mr. Jerry L. Gardner Jr.
Gardner, Robein & Urann
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: International Union of Operating Enginers, Local 406, et al.
v. Robert Guidry
No. 89-1297

Dear Mr. Gardner:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Breininger v. Sheet Metal Workers International Association Local Union No. 6, 493 U.S. ——— (1989).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
Joseph F. Spaniol, Jr., Clerk

APPENDIX D

Robert Guidry,

Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Defendants-Appellants,
Cross-Appellees.

No. 87-4733.

United States Court of Appeals,
Fifth Circuit.

Aug. 29, 1989.

Union members brought action against union and its official for denial of rights guaranteed by Labor Management Reporting and Disclosure Act and for breach of union's duty of fair representation. The United States District Court for the Western District of Louisiana, Lake Charles Division, Earl E. Veron, J., 669 F.Supp. 763, entered judgment for plaintiffs, and defendants appealed as to one union member. The Court of Appeals, King, Circuit Judge, held that: (1) district court's finding that manipulation of hiring hall procedure was for discriminatory intent was not clearly erroneous; (2) manipulation of hiring hall procdedure constituted "discipline" within meaning of Labor Management Reporting and Disclosure Act; and (3) remand for determination of damages under correct statute of limitations was required.

Affirmed in part, vacated in part and remanded.

Appeals from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA and KING, Circuit Judges.

KING, Circuit Judge:

The plaintiff-appellee, Robert Guidry sued the defendants-appellants, the International Union of Operating Engineers, Local 406 and former and current Union leaders alleging denial of rights guaranteed by 29 U.S.C. sec. 411(a) (1985), unlawful discipline in violation of 29 U.S.C. sec. 529 (1985), and breach of the duty of fair representation. The United States District Court for the Western District of Louisiana found in favor of the plaintiff.[1] The court awarded damages for lost wages, emotional distress, punitive damages and attorney's fees and ordered that Guidry be reinstated to Union membership. We affirm the judgment of liability, but we remand the award of damages for further findings.

I. FACTS

The facts, as found by the district court, are summarized as follows:

A. Background and Players

Plaintiff-appellee Robert Guidry ("Guidry") became a member of the International Union of Operating Engineers, Local 406 (the 'Union") in 1949. The Union is a

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[1] The district court held trial on five related cases simultaneously and found for the plaintiff in each of the cases. *Taliaferro v. Schiro*, 669 F.Supp. 763 (W.D.La.1987). The defendants appeal the judgment in this case only.

constituent division of the International Union of Operating Engineers and is an unincorporated labor organization with six districts in the state of Louisiana. There is an office within each district, and the statewide central office is in New Orleans.

The Union elects a statewide Business Manager and Financial Secretary who works out of the central New Orleans Office. Defendant Peter Babin III ("Babin") has served in this position since 1976. The Business Manager negotiates collective bargaining agreements in Louisiana, serves on a committee that negotiates the National Pipe Line Agreement, acts as a trustee of the Union's Health and Welfare Fund, and appoints and supervises assistant business managers in the various districts who oversee the day-to-day functioning of the Union. These assistant business managers are also known as "business agents" ("BAs") and they represent the Union at pre-job conferences, administer the hiring hall procedures, and appoint union stewards and master mechanics to act as representatives for the Union on the job.

Babin's predecessor as Business Manager appointed defendant Willard Carlock, Sr. ("Carlock") as BA for the Union's Lake Charles District. After he took office, Babin retained Carlock as BA until Carlock and his administration of the district came under criminal investigation. Babin fired Carlock on March 10, 1984. *Taliaferro v. Schiro,* 669 F.Supp. 763, 766 (W.D.La. 1987).

Babin appointed defendant Columbus J. Laird ("Laird") as BA for the Lake Charles District in 1978. Laird technically had as much authority as Carlock, but he considered Carlock his boss and followed Carlock's instructions. Laird was in office until January 15, 1985 when he resigned, after an indictment was brought against

him, Carlock, and others. *Id.*

Babin appointed Don Schiro ("Schiro") to be statewide Pipe Line Business Agent in March 1980. Schiro represented the Union in pipeline construction jobs controlled by the National Pipe Line Agreement and was responsible for attending pre-job conferences and appointing stewards and referring workers to pipeline jobs. However, Schiro generally left these deatails to BAs such as Carlock and Laird. *Id.*

The district court found that Babin's supervision of the BAs was "totally inadequate." 669 F.Supp. at 775-76. Upon appointing a BA, Babin instructed him to run the hiring hall on a non-discriminatory basis, but otherwise did very little to supervise. He met with each BA semi-annually to discuss local problems. He had no formal evaluation procedure, but instead relied on his own re-election as evidence that Union members were satisfied with the performances of the BAs from their districts. *Id.* at 765.

B. The Lake Charles District Hiring Hall

1) *Generally*

The Union, as the exclusive collective bargaining agent for operating engineers in its jurisdiction, signed two major collective bargaining agreements. The first agreement is between the Union and the Lake Charles District, Associated General Contractors of Louisiana, Inc. and governs the building and construction industry (the "Building Trades Agreement"). The National Pipe Line Agreement covers all transportation mainline pipeline and underground cable work. Both agreements specify that the Union will provide labor through an exclusive hiring hall.

The method for registering applicants for referral is set out in the agreements and involves placing individuals in four groups according to their work experience. The Union has always disregarded this rule and it has, instead, grouped workers together, keeping only a separate group for oilers. The hiring hall maintains two separate lists for building trades projects and pipeline projects, and, since March 1984, a worker can keep his or her name on only one list at a time. Both lists contain names in the order in which the applicant notifies the Union that he or she is available for work.

2) *Departures from the Hiring Hall Procedure*

Both Agreements allow the contractor to hire some of its employees on any given job outside the structure of the hiring hall. The Building Trades Agreement allows the contractor to hire key personnel directly and to recall any worker who has been employed by that contractor for a least six of the previous twelve months. The National Pipe Line Agreement allows the contractor to hire half its workforce from a group of "regular employees." Regular employees have either been employed by the contractor in the prior six months or are customarily employed by that contractor whenever it has work. *Id.* at 767.

Additionally, the Union has developed informal departures from the regular hiring hall procedure of offering a referral to the first applicant on the list. The first of these exceptions is based on the fact that the Union can, according to the agreements, name stewards to pipeline projects and master mechanics to building trades jobs to act as Union representatives. The procedure for such appointment under the agreements is to name an individual from among the Union members already referred to the job. Carlock, Laird, and Schiro departed from this rule by nam-

ing stewards and master mechanics to jobs, regardless of their positions on the list. Schiro sometimes appointed individuals who were not yet even on the list to steward positions when the job they were working on at the time was nearing completion. *Id.* at 768.

Short-term jobs, which are expected to last one to three days, also were treated as exceptions to the hiring hall procedure. Referrals for these jobs were simply given to those applicants who were present at the Union hall at the time the referral was received, irrespective of the applicants' places on the list. Union leadership made a similar exception for temporary replacements of workers who were incapacitated or could not otherwise perform their jobs. *Id.* at 768.

Finally, the Union's collective bargaining agreement with Dolphin Construction Company required that the Union refer residents of Allen Parish to its construction project there. Allen parish residents, therefore, received referrals to those jobs before non-residents whose names were higher on the list.

3) *Manipulation of the Hiring Hall Procedures and the Exceptions*

The district court found that Carlock "exploited[ed] and, at times, disregard[ed] entirely the hiring hall procedures to enrich his confederates to the detriment of the plaintiff and others." *Id.* at 769. The district court went on to explain specifically the various ways in which Carlock accomplished this: (1) appointing his confederates as stewards or master mechanics irrespective of their skills or their places on the list; (2) abusing the short-term referral exception to designate some jobs as short-term that he knew to be substantially longer than three days; (3) allow-

ing contractors to employ as "regular employees" workers who did not meet the requirements of that group as outlined in the National Pipe Line Agreement; (4) designating a referral as a recall under the Building Trades Agreement regardless of the individual's eligibility for recall. *Id.* at 769.

The district court found that Carlock quelled opposition by means of "intimidation and threats of retaliation in the form of economic discrimination and physical injury." *Id.* Also, the court found that Union members feared voting against Carlock because the balloting was not secret and they feared retaliation. *Id.* Finally, the court noted that Carlock made it difficult for disgruntled or suspicious workers to check their positions on the out-of-work list by keeping possession of, or control over, that list. *Id.* at 769-70.

II. PROCEDURAL BACKGROUND

After a bench trial, the district court held in favor of the plaintiffs. The court awarded Guidry—who is the only plaintiff against whom this appeal is brought—lost wages totaling $5,310.50, $20,000 for emotional distress, $10,000 in punitive damages. The court also awarded attorneys' fees in an amount to be agreed to by the parties, or in default of that, to be set by the court. All of the above awarded damages were to be paid by the Union. The court also ordered the reinstatement of Guidry as a Union member. Additionally, the court awarded Guidry $1000 in punitive damages to be paid by Babin. The defendants timely appealed the judgment of the district court, asserting that Guidry failed to prove liability and that the damage awards are improper or excessive. Guidry cross-appeals the amount of damages awarded for emotional distress, lost wages, and punitive damages—arguing that

they are inadequate.

III. THE QUESTIONS OF LIABILITY

The Union, Carlock, Babin, Schiro, and Laird (collectively the "defendants") argue on appeal that the district court erred in holding them liable under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. secs. 401-531 (1985 and Supp.1986) ("LMRDA"). The defendants also challenge the district court's conclusion that Union hiring hall procedures violated the duty of fair representation under the Labor Management Relations Act sec. 9(a), 29 U.S.C. sec. 159(a) (1973) ("LMRA"). Further, the defendants argue that Guidry failed to exhaust his internal union remedies, and therefore, his case should have been dismissed.

A. The LMRDA Claim

Guidry argued below, and the district court found, that his rights under sections 101(a)(1), (2) of the LMRDA had been abridged, 29 U.S.C. secs. 411(a)(1), (2) and that he had been wrongfully disciplined under sections 101(a)(5) and 609, 29 U.S.C. secs. 411(a)(5)[2]

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[2] Sections 411(a)(1), (2), and (5) read as follows:

(1) Equal Rights

Every member of a labor organization shall have equal rights and privileges within such an organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' constitution and bylaws.

(2) Freedom of Speech and Assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views,

and 529.[3] The court concluded that the defendants' manipulation of the hiring hall procedures to the detriment of Guidry and the other plaintiffs constituted violations of these provisions. It also concluded that Guidry's expulsion from the Union was violative of the LMRDA. The defendants assert that the evidence presented at trial does not support this portion of the verdict and that, therefore, the district court's factfinding is clearly erroneous for two reasons: (1) that there was no evidence to support the conclusion that Guidry exercised rights guaranteed him by the LMRDA and (2) that there was no evidence to support the conclusion that the Union acted to retaliate against Guidry

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Footnote 2 continued.
arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(5) Safeguards Against Improper Disciplinary Action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organizataion or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 101, 29 U.S.C. Sec. 411, is often referred to as the union members' "Bill of Rights."

[3] Section 529 ("Prohibition on certain discipline by labor organization") reads as follows:

It shall be unlawful for any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

for having exercised those rights. Additionally, the defendants argue that even if the evidence supports the district court's underlying fact findings, its legal conclusion that the manipulation of hiring hall procedures constitutes "discipline" within the meaning of the statutes is erroneous. We address these arguments in order.

1) *Did Guidry Oppose Union Leadership?*

The district court found that "Guidry [had] a long history of opposing incumbent Union officers." 669 F.Supp. at 772. The defendants challenge this finding as clearly erroneous and unsupported by the evidence and assert that Guidry failed to show either that he actually opposed Union leadership or that his opposition of that leadership was known. They characterize the evidence as demonstrating that Guidry opposed the Union leadership only until 1972,[4] and as failing to show—aside from Guidry's own testimony that he had opposed every administration since 1956—that his opposition continued beyond 1972. The defendants cite *Chapa v. Local 18*, 737 F.2d 929, 932 (11th Cir.1984), for the proposition that a plaintiff's "bald assertion" that he opposed union leadership and that the union retaliated is insufficient to support a verdict for the plaintiff on an LMRDA wrongful discipline claim.

We begin by noting that the defendants are urging us to review the district court's factfinding. Our review is limited by Federal Rule of Civil Procedure 52(a), which provides that we may not set aside such findings unless "clearly erroneous." This standard of review has been interpreted

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[4] It is clear from the evidence that the last time Guidry ran for Union office was in 1972.

to mean:

> [that] [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Applying this standard, we conclude that the district court's factfinding is not clearly erroneous. The defendants' characterization of the record is incomplete. Far from simply containing Guidry's conclusory assertions that he generally opposed Union management, the record contains Guidry's specific testimony of particular instances of his opposition to the Union.

Guidry described in detail the circumstances of his decision in 1979 to go to the Federal Bureau of Investigation ("FBI") with evidence of Union corruption. Guidry made that decision after discussing his position with fellow Union members. Guidry testified that when Carlock and Laird discovered that he had gone to the FBI, they came on the job site at which Guidry was employed as master mechanic and sought to force his employer to discharge him. Guidry ultimately filed charges against Carlock and the Union's executive board. Although these events occurred outside the one-year prescriptive period applicable to Guidry's LMRDA claim, *see infra* at section IV.A, they are not too remote in time to have been found by the district court to have triggered Union retaliation.

Guidry's testimony is replete with examples of challenges he levelled against the Union leadership's operation of the hiring hall. These include a challenge to the hiring methods on a job for which he was asked to steward—Guidry openly complained that men who had never worked for the company before were hired as "regular employees." Guidry also challenged the hiring hall when he discovered that his name had been left off the out-of-work list as a result of a new rule that required him to choose between the building trades and the pipeline lists.

According to Guidry's testimony, as well as that of Union members, Guidry's opposition to the Union leadership was hardly a secret. Charles Lovett, a member of the Union who was called to testify for the plaintiffs, noted that Guidry had been "bucking the system" at the Union for twenty-five years and had gained nothing.

[1] The Union challenges this testimony as inadequate because it fails to show that Guidry either sought a Union office after 1972 or openly campaigned against the Union leadership in an election after 1972. The defendants argue that all of Guidry's political activity in the Union is too remote in time to support a claim of retaliation occurring in 1980-83. The flaw in the defendants' argument is their assumption that in order to assert a violation of section 101(a)(2) of the LMRDA, a plaintiff must show that he or she spoke out in opposition to Union leadership in the context of an election. We read the statute to contain a much broader protection of speech.

The statute itself speaks of the right of every union member to "express any views, arguments or opinions," 29 U.S.C. sec. 411(a)(2), *supra* n. 2, and does not limit such expression to one occurring in the context of a union election. In fact, the statute refers separately to a union member's

right to express his views upon candidates running for union office. *Id.*

The Supreme Court has characterized the LMRDA as "the product of congressional concern with widespread abuses of power by union leadership." *Finnegan v. Leu*, 456 U.S. 431, 435, 102 S.Ct. 1867, 1870, 72 L.Ed.2d 239 (1982). The "Bill of Rights" portion of that legislation was "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution." *Id.* at 435, 102 S.Ct. at 1870. Congress "recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Sheet Metal Workers' Intern. Ass'n v. Lynn*, ___ U.S. ___, ___, 109 S.Ct. 639, 645, 102 L.Ed.2d 700 (1989) (quoting *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 112, 102 S.Ct. 2339, 2346, 72 L.Ed.2d 707 (1982).

[2] The defendants do not cite, nor have we found, any cases that limit the free speech rights protected by the LMRDA's Bill of Rights to speech relating directly to an election within the union. While we agree with the defendants' position that the evidence adduced at trial does not support the conclusion that Guidry formally opposed Union leadership after 1972 in the context of a Union election, we conclude that the district court was not clearly erroneous in its finding that Guidry openly opposed Union leadership at least up to the time that he filed this suit.

2) *Did the Union Act to Retaliate Against Guidry for exercising Free Speech Rights?*

[3] The district court found generally that hiring hall procedures were abused and threats of retaliation in the form of economic and physical injury were used to control

Union members and to enrich those members who supported the leadership. 669 F.Supp. at 769. The court also enumerated the instances of such reprisals that specifically related to Guidry. In addition to discrimination in the hiring hall, the district court found that the Union retaliated against Guidry for his opposition to leadership by denying him a gold Union membership card recognizing his thirty years of service. Also, the district court found that Union economic pressure forced Guidry to violate Union rules and cross a picket line. The court found that when Guidry faced charges for having crossed the picket line, Laird telephoned supporters of the leadership to ensure that they would attend the meeting at which the membership was to vote on Guidry's fate—thus, making his expulsion almost certain.

The defendants challenge these factfindings as clearly erroneous. They argue that even if Guidry did show that he had been discriminated against in hiring hall referrals, he failed to show that such discrimination was connected to his exercise of rights protected under the LMRDA. They argue that the other union acts found by the district court to have been discriminatory were justified by long-standing Union rules.

The record contains abundant evidence, both in the form of testimony and documentation, of the procedures followed by Union leadership in referring applicants to jobs through the hiring hall. The court found twenty-one specific instances in which Union leadership manipulated the hiring hall procedure by employing one of the means outlined above. This resulted in direct harm to Guidry. *See Taliaferro,* 669 F.Supp. at 781-86 (Appendix). The district court concluded that each improper referral had been used to penalize Guidry (and the other plaintiffs) for their

refusal to support the defendants. *Id.* at 776.[5] We do not find clear error in this conclusion.

The defendants argue that Guidry failed to show in each case of hiring hall discrimination that the intent of Union leadership was discriminatory. We disagree. Guidry (and the other plaintiffs) provided substantial evidence, particularly in the testimony of Laird, of the attitude of Carlock toward those members who had "voted wrong" in prior elections, and of the control Carlock exercised over the out-of-work list. This evidence, coupled with the clear evidence of Guidry's dissent from Union leadership, is sufficient to support a conclusion that the discrimination was intentional. Even though the evidence is largely circumstantial, it is sufficient to support the verdict. *See Vandeventer v. Local 513 of Int'l Union of Op. Eng.*, 579 F.2d 1373, 1380 (8th Cir.) (holding that primarily circumstantial evidence was sufficient to support verdict that union had taken retaliatory action.), *cert. denied*, 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

Additionally, the plaintiffs introduced testimony and exhibits regarding the specifics of each wrongful referral found by the district court. After reviewing the evidence supporting each of the twenty-one wrongful referrals, which involved jumping over Guidry's name on the

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[5] The district court also concluded that each improper refusal constituted a breach of the duty of fair representation under 29 U.S.C. sec. 159(a). 369 F.Supp. at 775-76. The defendants dispute this conclusion, solely on the gound that the evidence is insufficient to support the fact-finding that intentional discrimination in hiring hall referrals had occurred. We therefore conflate their arguments under the LMRDA and the duty of fair representation to the extent they concern the sufficiency of the evidence. That is, we address only once the issue of whether the finding that the operation of the hiring hall was intentionally discriminatory was clearly erroneous.

out-of-work list, this court is convinced that the district court's factfinding is correct and supported by substantial evidence. We, therefore, do not disturb the district court's conclusion that discrimination in the hiring hall referrals took place and was used in retaliation for Guidry's failure to support Union leadership.

3) *Does the Manipulation of Hiring Hall Procedures Constitute Discipline within the Meaning of sections 101(a)(5) and 609 of the LMRDA?*

[4] The defendants challenge the district court's holding that the wrongful hiring hall referrals constitute "discipline" within the meaning of sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. secs. 411(a)(5) and 529. they argue that according to *Finnegan v. Leu, supra,* the term "discipline" in section 609 refers to actions taken by the union that diminish the membership rights of a union member. Hiring hall discrimination does not qualify, according to the defendants, because hiring hall referrrals must be made available to non-union members. *United Ass'n of Journeymen, Local 198 v. NLRA,* 747 F.2d 326 (5th Cir.1984); National Labor Relations Act, sec. 8(b)(1)(A), (b)(2), 29 U.S.C. sec. 158(b)(1)(A), (b)(2).

The issue presented here—whether proof that a union has retaliated against one of its members for his exercise of a right protected under section 101 of the LMRDA constitutes "discipline" within the meaning of section 609 of that act—has been addressed by a number of courts with apparently contradictory results. We conclude, however, that the cases can be harmonized, and we hold that under the facts presented here, Guidry has made out a proper claim for wrongful discipline in violation of the LMRDA.

In *Miller v. Holden*, we held:

> Union action which adversely affects a member is "discipline" only when (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership, and (2) it directly penalizes him in a way which separates him from comparable members in good standing.

535 F.2d 912, 915 (5th Cir.1976). We decided that the claim brought in *Miller*—that the plaintiff's discharge from his employment by a trust established by, but separate from, his union—did not state a cause of action under the LMRDA because the discharge did not constitute "discipline" under the statute. In determining the meaning of discipline we looked first to the statute and its legislative history, *id.* at 914 n. 5 (citing 1 Legislative History of LMRDA of 1959), 338, 516, 619, 687, 858 (NLRB ed. 1959)), but concluded that neither was enlightening on the issue. We, therefore, applied the principal of statutory construction of *ejusdem generis* and construed the general term discipline to conform to the essential character of the three specific types of discipline listed in the statute: fine, expulsion, and suspension. *Id.* at 914-15. Our result required, as quoted above, that the union action separate the plaintiff from other union members in good standing to constitute discipline.

We followed the holding in *Miller* to find that manipulation of hiring hall referrals to the detriment of the plaintiff constituted discipline within the meaning of LMRDA in *Keene v. International Union of Op. Eng. Local 624*, 569 F.2d 1375 (5th Cir. 1978). In that case, the plaintiff had unsuccessfully run for union office. He showed that after his loss in the election he received virtually no referrals through the union's hiring hall and that over two hun-

dred people with less priority on the out-of-work list received referrals in preference to him. We held that a jury could reasonably conclude that such discrimination is referrals constituted discipline for exercising rights protected under the LMRDA.

The question, however, is not so easily resolved. The Supreme Court addressed the issue of what constitutes "discipline" under section 609 of the LMRDA in a different but related, context in *Finnegan v. Leu, supra.* In that case, the plaintiffs sued under the LMRDA after they were discharged from their employment as union business agents following the election of Leu as president of the union. The plaintiffs had openly supported Leu's rival, the incumbent president, in the campaign. At trial, Leu explained that he had discharged the plaintiffs because he felt that they were loyal to the incumbent and would be unable to implement his policies. The Court held that the term discipline in section 609 "refers only to retaliatory actions that affect a union member's rights or status as a *member* of the union." 456 U.S. at 437, 102 S.Ct. at 1871 (emphasis added). It concluded that the discharge of the plaintiffs from their appointive union positions was not within the scope of "other discipline" contemplated by section 609. *Id.* at 439, 102 S.Ct. at 1872.[6] The Court reasoned that the

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[6] The Court went on to address the question of whether section 102 of the LMRDA, 29 U.S.C. sec. 412, provided independent authority for the suit. Section 102 provides that:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

the LMRDA was intended to protect rank-and-file union members, rather than union officers or employees. Therefore, while the plaintiffs' right to campaign against a candidate for union president was protected, such campaigning did not immunize them from discharge at the pleasure of the new president from their jobs as union employees.

In cases not involving the loss of employment within the union itself, an apparent conflict in interpreting *Finnegan* has arisen in the cases. In *Hackenburg v. International Bhd. of Boilermakers, Local 101,* 694 F.2d 1237 (10th Cir. 1982), the court followed *Finnegan* to hold that union members who were "benched"—that is they received no referrals—following a wildcat strike had not been "otherwise disciplined" within the meaning of the LMRDA.

Footnote 6 continued.
The Court noted that the intended relationship between this provision and section 609 was "not entirely clear," 456 U.S. at 439, 102 S.Ct. at 1872, but indicated that a litigant could maintain an action under section 102 without necessarily stating a violation of section 609. However, it concluded that in the circumstances before it no "rights secured" by the subchapter had been infringed, holding that whatever limits the subchapter placed on the union's authority to use dismissal to suppress dissent, it did not restrict union leaders from choosing a staff with views compatible with their own. *Id.* at 440-41, 102 S.Ct. at 1872-73. In *Sheet Metal Workers' Inter. Ass'n v. Lynn,* ___ U.S. ___, 109 S.Ct. 639, 102 L.Ed.2d 700 (1989), the Court recently limited this portion of the holding in *Finnegan* to cases in which the union employment was appointive, rather than elective. The Court reasoned in *Lynn* that when an elective official is removed from his post, the union members are denied their chosen representative, and the chilling effect on free speech is more widespread. *Id.* 109 S.Ct. at 645.

Because we find that a violation of section 609 has occurred here, it is clear that this suit could also be maintained under section 102. That does not, however, affect the result here.

In *Hackenburg*, the union, following the terms of its collective bargaining agreement with an employer, deprived the plaintiffs of any job assignments for ninety days as a result of their involvement in a wildcat strike. The plaintiffs sued, arguing that they had been "otherwise disciplined" within section 101(a)(5), without the procedural protections afforded by that section. The court determined that the "sanctions imposed were employment related rather than internal union related," 694 F.2d at 1240, and, relying on *Finnegan*, held that the procedural safeguards of section 101(a)(5) were not available because the punishment was not related to the union members' rights or status as members. *Id.* at 1239.

Turner v. Local Lodge #455 of the Int'l Bhd. of Boilermakers, 755 F.2d 866 (11th Cir.1985), involves circumstances very similar to those in *Hackenburg*. The plaintiffs in *Turner* also suffered a ninety-day benching pursuant to the terms of a collective bargaining agreement as a result of their refusal to cross an illegal picket line. The court first noted that the plaintiffs' contention that the benching had actually occurred in retaliation for their exercise of rights protected by section 101(a)(1) and (2) of the LMRDA had been properly taken away from the jury because of the lack of evidentiary support. It then addressed the plaintiffs' contention—which was identical to that in *Hackenburg*—that the benching had violated section 101(a)(5) because proper procedures had not been followed before the union imposed the sanction.

The court considered the broad language in section 101(a)(5) and stated that "the sweeping language . . . cannot be read out of context, but must be taken as backing and support for union members exercising their 'Bill of Rights' and that any union disciplinary measure unrelated to the 'Bill of Rights' is not covered." *Turner*, 755 F.2d at

869. Therefore, the absence of any claim of retaliation by the union was fatal to the plaintiffs' LMRDA claim. The court then went on to state that under the interpretation of "discipline" found in *Finnegan*, the benching in the case before it did not constitute discipline, because it did not affect the plaintiffs' rights as members of the union in as much as union membership is not a requirement in order for one to be carried on the out-of-work list and receive employment referrals. *Id.* In concluding, however, the court noted that "the case might be different" if there had been evidence of, for example, "retaliation for exercise of a protected right." *Id.* at 870.

Such a different result was reached by the Sixth Circuit in *Murphy v. International Union of Op. Eng. Local 18*, 774 F.2d 114 (6th Cir.1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1201, 89 L.Ed.2d 315 (1986), in which the court found that a denial of work assignments through a hiring hall to a union member in retaliation for his opposition of union leadership could be considered "discipline" within the meaning of section 101(a)(5). *Murphy*, 774 F.2d at 122. The court went on to uphold the district court's conclusion that although the union's actions were not "discipline," they were nevertheless actionable as violative of sections 101(a)(1) and (2). The court distinguished *Finnegan* on the ground that the *Finnegan* court had been concerned with union employees and the right of a union leader to choose people to help him run the union. *Id.* at 123. The court stated: "Plainly, the Supreme Court in *Finnegan* did not intend to rule out [29 U.S.C.] section 411 as a protection against manipulative discrimination on behalf of an ordinary union member seeking to exercise his right of expression at union meetings." *Id.* The court also distinguished *Turner* and *Hackenburg* simply by noting that the unions involved in both had acted pursuant to collective bargaining agreements. *Murphy*, 774 F.2d at 122 n. 5. The

court did not address the question of whether the language in *Turner,* which states that a refusal to refer a member to employment does not affect his right as a member, 755 F.2d at 869, precluded a determination that such a refusal could constitute discipline in any circumstances.

In *Moore v. Local 569 of the Int'l Bhd. of Elec. Workers,* 653 F.Supp. 767 (S.D.Cal.1987), the court directly addressed the problem avoided in *Murphy*—that *Turner* appears to preclude a holding that discriminatory referral procedures affect union members' *rights* as a member of the union. The court began by analyzing the reasoning in the problematic dicta from *Turner* that because non-members could take advantage of a union hiring hall, membership rights are not affected by a discriminatory hiring hall. *Moore,* 653 F.Supp. at 770. The *Moore* court decided that this language did not preclude a determination that membership rights were ever affected by such discrimination for two reasons. First, the court inferred that in *Turner,* the plaintiffs no longer had a right to be referred to work because of their involvement in wildcat strikes prohibited under the collective bargaining agreement. *Id.* Second, and more importantly, the court reasoned that one of the rights of a union member was to receive non-discriminatory referrals from the union hiring hall. The court concluded that the ability of non-members to place their names on the out-of-work lists did not diminish and, in fact, had no relationship to that right. The court, therefore, rejected the union's contention in the case before it that the dicta in *Turner* regarding the issue of whether benching could constitute discipline should control. It found instead that the plaintiffs' allegations stated a cause of action under section 609 of the LMRDA. *Id.* at 770-71.

We agree with the *Moore* court's rejection of this

dicta from *Turner* in circumstances such as those before us. It is apparent from the evidence that Guidry's name was repeatedly skipped over on the out-of-work lists in retaliation for his out-spoken opposition to Union leadership. Here, as in *Murphy*, and as distinguished from *Turner* and *Hackenburg*, there was evidence of a reprisal for exercise of rights protected under the LMRDA. The *Turner* court itself noted that if there is evidence of union retaliation the case might be different. We also point out that here, as distinguished from *Finnegan*, the question involves the right to fair treatment of a union member by his union. In *Finnegan*, the plaintiffs were seeking to retain their employment by the union, not something to which every union member is entitled. Here, on the other hand, the plaintiff simply seeks not to be singled out for unfair treatment by his union. We simply cannot agree with the defendants' contention that discriminatory administration of the hiring hall does not represent the kind of discipline covered by the LMRDA.

B. Exhaustion of Union Remedies.

The defendants challenge the district court's ruling on the ground that Guidry failed to exhaust his internal union remedies, and, as a result, they argue that his suit should have been dismissed. In his complaint, as well as on brief to this court, Guidry asserts that pursuit of his internal union remedies would have been futile, and therefore, he is not required to exhaust that avenue before filing this suit. The district court did not directly address this question, although it clearly did not find that Guidry's failure to exhaust internal union remedies precluded this suit.

Section 101(a)(4) of the LMRDA, 29 U.S.C. sec. 411(a)(4), allows courts in their discretion to require that a union member exhaust his internal remedies before filing

suit. *See* 29 U.S.C. sec. 411(a)(4); *Hammons v. Adams*, 783 F.2d 597, 603 (5th Cir.1986); *Chadwick v. International Bhd. of Elec. Workers, Local 175*, 674 F.2d 939 (D.C.Cir.1982).

[5,6] Before a union member may bring suit against his union for breach of the duty of fair representation under section 301 of the LMRA, 29 U.S.C. sec 185, the member must either exhaust union remedies or show an adequate reason for not doing so. *Clayton v. International Union*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981). Here too, courts have discretion to decide whether to require such exhaustion. *Id.* at 689, 101 S.Ct. at 2095. Factors relevant to the inquiry of whether to require exhaustion are: (1) whether union officials are so hostile to the member that he cannot hope to obtain a fair hearing; (2) whether the union proceedures are adequate; and (3) whether requiring exhaustion would unreasonabaly delay the member in pursuing his rights. *Id.* Guidry asserts that the first of these exceptions is applicable here.

[7,8] The Union Constitution and By-laws, admitted into evidence in the court below, provide simply that the local union's determination of any grievance shall be final and binding. Neither provides specific grievance procedures for the type of complaint Guidry asserts. In such absence of procedural requirements, an employee may proceed to file suit after pursuing his contractual remedies. *Hammons*, 783 F.2d at 602. Additionally, where it is clear, as here, that because the complaint is directed at those officials who would hear Guidry's complaint, the member should be excused for his failure to exhaust internal remedies. *Hayes v. Brotherhood of Ry. and Airline Clerks/Allied Servs. Div.* 734 F.2d 219 (5th Cir.), *cert. denied*, 469 U.S. 935, 105 S.Ct. 336, 83 L.Ed.2d 272 (1984).

IV. THE DAMAGE AWARDS

A. The Statute of Limitations

[9] The district court, following *Local 1397, United Steelworkers of Am. v. United Steelworkers of Am.*, 748 F.2d 180 (3d Cir.1984), applied a six-month statute of limitations to the plaintiffs' LMRDA claims. It therefore looked back six months prior to the date of filing of the suit to determine the amount of damages. After the district court rendered its decision, and after oral argument on this case, the Supreme Court overruled *Local 1397. Reed v. United Transp. Union*, ____ U.S. ____, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989). The Court held in *Reed* that, unlike claims brought under section 301 of the LMRA, *see DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), claims brought under section 101(a)(2) of the LMRDA are more akin to civil rights claims than to unfair labor practice charges. Therefore, the court reasoned under the rule established in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the state general or residual personal injury statute of limitation should apply to actions brought under section 101(a)(2). Therefore, we look to Louisiana state law to determine the appropriate statute of limitations for the LMRDA claims. The claims under section 301 of the LMRA are, however, still subject to the six-month limitation.

[10] Article 3492 of the Louisiana Civil Code provides a one-year limitations period for delictual actions, which include personal injury actions. La.Civ.Code Ann. art. 3492 (West supp.1989). Therefore, the limitations period that should be applied to Guidry's claims under the LMRDA is

one year.[7] Because the damages amount must be based in part on facts not found by the district court, we must remand the damages portion of this cause for a redetermination of the amount of damages to be awarded. However, we can and will address the legal issues raised by the parties regarding the types of damages awarded.

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[7] A subsidiary issue is whether *Reed* should be afforded retroactive effect in this case. We believe that it should.

The general rule is that federal cases should be decided according to the law existing at the time of the decision. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 577 (1987). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), however, the Supreme Court declined to apply retroactively a limitations period that would have time barred a litigant's lawsuit. The Court refined a three-part nonretroactivity test: (1) the supervening decision must establish an unforeseen and unforeshadowed principle of law, as where the Court has overruled clear circuit precedent on which the litigants may have relied; (2) the purposes of the substantive law upon which the limitations period operates would not be served by retroactivity; and (3) retroactive application would produce inequitable results. *Id.* at 106-07, 92 S.Ct. at 355-56. These factors provide no basis for refusing retroactive application of *Reed* to this case.

Prior to *DelCostello*, the established precedent in the Fifth Circuit specified application of an appropriate state statue of limitations in section 101(a)(2) cases. *Sewell v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 445 F.2d 545, 548-50 (5th Cir.1971), *cert. denied*, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972) (applying a one-year Alabama statute of limitations for tort actions). No post-*DelCostello* Fifth Circuit decision definitively altered this rule until the district court below adopted the Third Circuit's *Local 1397* interpretation of a six-month limitations period. Thus, *Chevron's* first factor clearly is not satisfied: Fifth Circuit precedent was not overruled by, but in fact supported, the *Reed* decision; at most, the limitations issue was unsettled after *DelCostello*. Likewise, the remaining two *Chevron* factors, cannot be met. Applying Louisiana's one-year limitations period to determine damages in this case would further the remedial goals of section 101(a)(2) of the LMRDA without substantially frustrating any federal policy of repose, and would not be inequitable, as litigants in this Circuit could not have justifiably relied on a six month limitations period prior to *Reed*. *See Goodman*, 482 U.S. at 662-64, 107 S.Ct. at 2621-22.

1) *Punitive Damages*

The district court awarded punitive damages to be paid both by the Union and Babin, relying on *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir.), *cert. denied*, 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed.2d 854 (1968), and *Parker v. Local Union No. 1466, United Steelworkers of Am.* 642 F.2d 104, 106 (5th Cir.1981), for the proposition that punitive damages may be awarded under the LMRDA where the union acted with "actual malice or reckless or wanton indifference to the rights of the plaintiff." *Braswell*, 388 F.2d at 199.

On appeal, the defendants urge us to overrule this Circuit's precedent and rule that punitive damages are unavailable in LMRDA cases. Alternatively, they argue that the evidence does not support the finding of malice on which the punitive damage award depends. We find neither argument convincing.

As to the first argument, we simply point out that as a panel of this court, we are not free to overrule the precedent of prior Fifth Circuit cases. Only the *en banc* court has the necessary power to do so. *National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d 1295, 1301 (5th Cir.1978). As to the defendants' second argument, we point to our discussion *supra* at parts III A. 1 and 2 of the sufficiency of the evidence. We conclude that the evidence adduced at trial supports the district court's finding of malice, and therefore we uphold the court's decision to award punitive damages, although, for the reason noted below, we vacate the amount of the award.

On cross-appeal, Guidry argues that the amount of punitive damages awarded was insufficient and he seeks enhancement of the amount to $250,000. The only argu-

ment Guidry advances for this position asserts essentially that because the Union can afford more, this award is not sufficiently punitive. Because we remand this case for a redetermination of the damage award, we decline to address this issue. Because the district court may have been influenced in its decision on punitive damages by the amount of actual damages, we vacate the punitive damage award and leave it to the district court, in its discretion, to fix once again the amount of punitive damages when the amount of actual damages has been recomputed.

2) *Emotional Distress*

[11] The defendants also contest the award of damages for emotional distress, arguing that because the plaintiffs failed to present evidence of any physical manifestations of that distress, such an award is unavailable under the LMRDA. We agree that emotional distress "standing alone does not constitute a sufficient basis for the awarding of damages under the [LMRDA]." *Bise v. International Bhd. of Elec. Workers, Local 1969*, 618F.2d 1299 (9th Cir.1979) (quoting *International Bhd. of Boilermakers v. Rafferty*, 348 F.2d 307, 315 (9th Cir.1965)), *cert. denied*, 449 U.S. 904, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980). In order to protect against spurious claims for emotional distress that might drain union coffers and thereby deprive other members of effective representation, some courts have required LMRDA claimants who seek damages for emotional distress also to adduce some evidence of actual injury. *See id.* Other courts do not impose an actual injury requirement. *Compare Bise, supra with Bradford v. Textile Workers of Am.*, 563 F.2d 1138, 1144 (4th Cir.1977). Whether to impose an actual injury requirement, as well as what such a requirement entails, are issues of first impression for this Circuit.

We conclude, as the district court did, that LMRDA claimants who seek damages for emotional distress must adduce some evidence of actual injury. The environment in which LMRDA claims arise—discipline and termination by both unions and employers—is emotionally charged at the outset and, thus, one in which claims for emotional distress are likely to be the rule rather than the exception. Moreover, the subjective nature of these claims makes it particularly difficult to dismiss meritless actions at early stages in the litigation—before the union has gone to considerable expense in defending the action. Hence, we agree with the Ninth Circuit that an actual injury requirement should be imposed in order to protect unions in their representative capacities from malice from within.

[12] A further issue to be resolved, however, is what type of evidence will suffice to establish "actual injury." Despite professed agreement, the two circuit courts that have addressed this problem construe "actual injury" in different ways. In *Rodonich v. House Wrecker's Union Local 95,* 817 F.2d 967 (2d Cir.1987), the Second Circuit upheld the following jury instruction: "[y]ou must find such mental or emotional distress based upon the particular plaintiff's physical condition or medical evidence." *Id.* The Second Circuit then declared that "[t]he qualification that claims of emotional distress be supported by a physical manifestation of injuiry is an appropriate safeguard against the award of excessive and speculative damages." *Id.; see also Petramale v. Local 17, Laborers' Int'l Union of North Am.,* 847 F.2d 1009, 1012 (2d Cir.1988). The Ninth Circuit, however, construes "actual injury" more broadly. In *Bise* and its progeny,[8] lost wages, as well as physical manifestations of emotional

[8] *See, e.g., Bloom v. International Bhd. of Teamsters,* 752 F.2d 1312, 1315 (9th Cir. 1984).

distress, served as sufficient indication of actual injury. In the case before us, the district court awarded damages for emotional distress to those plaintiffs who could demonstrate actual injury through lost wages.

We adopt the Ninth Circuit's approach. We fail to see why physical manifestations of injury should be the sole guarantor of genuineness; financial distress may well be the most reliable and frequent cause of mental distress. Moreover, whatever the indicia of actual injury used, plaintiffs who seek damages for emotional distress must present credible evidence of that distress. District courts should not be hidebound to antiquated notions about the nature of mental injury and suffering in order to determine whether an LMRDA claim is genuine. We therefore affirm the district court's interpretation of the actual injury requirement. We vacate the award, however, for reconsideration along with the other components of damages to be awarded.

3) *Attorneys' Fees*

[13] The district court awarded to Guidry and the other plaintiffs "reasonable" attorneys' fees. The court looked to *Hall v. Cole*, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945-46, 36 L.Ed.2d 702 (1973) to determine the standards for an award of reasonable attorneys' fees. *Hall* allows an award of attorneys' fees to a successful party even in the absence of statutory or contractual authority when his opponent has acted in bad faith or when his success in the litigation confers a benefit on members of an ascertainable class, and where the court's award of attorneys' fees will make it possible to spread the cost of litigation over the class of beneficiaries of the suit. The court below held that, in this case, attorneys' fees were available under both theories.

On appeal, the defendants argue that the district court's application of these two theories was an error of law. We agree.

The bad faith exception to the general rule—that absent contractual or statutory authority, attorneys' fees are not recoverable—is set out in detail in *Shimman v. International Union of Op. Eng., Local 18*,744 F.2d 1226, 1228-34 (6th Cir.1984) (en banc), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985). *Shimman* makes clear that the focus of the bad faith inquiry is not the actions that precipitated the law suit, but rather the manner in which the litigation itself is carried out. That is, the rule is intended to penalize the litigant who brings to court a frivolous suit or defense, or abuses the process so as to create an inquiry separate from the underlying claim. *Id.* at 1231. This court has adopted the same reasoning. *See, e.g., Batson v. Neal Spelce Assoc.*, 805 F.2d 546, 550 (5th Cir.1986).

There is no evidence that the defendants in this case have either brought a frivolous defense or pursued the litigation in a vexatious manner. For that reason, we disagree with the district court's holding that the bad faith exception is applicable here.

[14] The common benefit theory is also unavailable to Guidry. The *Shimman* court discussed this theory as well. In *Shimman*, as in the instant case, the underlying litigation resulted in a damage award benefitting only the plaintiffs personally. The plaintiffs contended in *Shimman*, as they do here, that although the money awards do not benefit the union membership as a whole, an incidental benefit of the awards—dispelling the chill on free speech created by union leadership—does inure to the benefit of all union members.

The court in *Shimman* explicitly rejected this theory. 744 F.2d at 1235. The court reasoned that the idea of the common benefit theory is to shift the costs of litigation to those who would have had to pay if they had brought the suit. *Id.* In *Shimman,* as here, other members of the union could not have brought suit to redress the injuries of an individual union member. Further, an award of attorneys' fees here would not spread the costs of litigation proportionate to the common benefit. Guidry would have to pay no more for the cost of litigation than any fellow union member, but he would receive substantially greater benefits in the form of cash awards.

We therefore hold that on remand, the district court should not include an award of attorneys' fees in its damages award.

4) *Lost Wages*

Guidry argues in his cross-appeal that the amount of losts wages awarded was inadequate to compensate him. Once again, we are not in a position to review the district court's damage determination because we are remanding that portion of the holding. We note, however, that the district court's method of determining the lost wages due—comparing Guidry's actual wages to the average amount earned by union members during the limitations period—is a sound and fair method of making that determination.

V.

For all the foregoing reasons, we AFFIRM the judgment as to the defendants' liability, and we VACATE the award of damages and REMAND for redetermination of the proper amount. Costs shall be borne by the defendants.

APPENDIX E

Howard TALIAFERRO

v.

Don SCHIRO, et al.

John CREEL, et al.

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Robert GUIDRY

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Jess W. ROWSEY

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Vincent REED, et al.

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Craig E. EDWARDS, et al.

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, et al.

Civ.A. Nos. 83-0388-LC, 83-1042-LC, 83-1141-LC, 84-0650-LC, 84-0777-LC and 84-1005-LC.

United States District Court,
W.D. Louisiana,
Lake Charles Division.

Sept. 9, 1987.

Union members brought action against union and its officers for denial of rights guaranteed by Labor-Managements Reporting and Disclosure Act and for breach of union's duty of fair representation. The District Court, Vernon, J., held that: (1) union officers' manipulation of hiring hall procedures constituted violations of Labor-Management Reporting and Disclosure Act, as well as breach of union's duty of fair representation; (2) six-month statute of limitations was applicable to both causes of action; and (3) unlawfully discriminated against union members were entitled to lost wages, damages for mental suffering, punitive damages, and attorney fees.

Judgment for plaintiffs.

Maurice Tynes, Levingston, Tynes & Liles, Lake Charles, La., for all plaintiffs, except Creel, Hatch and Johnson.

H. Alva Brumfield, III and William P. Brumfield, Brumfield & Brumfield, Baton Rouge, La. for plaintiffs Creel, Hatch and Johnson.

Floyd J. Falcon, Jr. and Daniel L. Avant, Avant & Falcon, Baton Rouge, La., for defendants Don Schiro and Peter Babin, III.

Jerry L. Gardner, Jr., Gardner, Robein & Healey, Metairie, La. for Int'l. Union of Operating Engineers, Local 406.

Columbus J. Laird, Oakdale, La., for Columbus J. Laird.

Willard S. Carlock, Sr., Seagoville, Tex., for Willard S. Carlock, Sr.

OPINION

VERON, District Judge.

The plaintiffs in these related civil actions are all members or former members of the International Union of Operating Engineers, Local 406 ("the Union"), seeking recovery from the Union and its officers for denial of rights guaranteed by 29 U.S.C.A. § 411(a)(1985) and for breach of the Union's duty of fair representation. In Civil Action Nos. 83-0388 and 83-1141 the plaintiffs also included a claim for unlawful discipline for exercising those rights in violation of 29 U.S.C.A. § 529 (1985). Trial was held in the related cases simultaneously. Having considered the

evidence presented at trial and the applicable law, as well as the oral and written arguments of counsel, the court finds for the plaintiffs and against the defendants for the reasons assigned below.

FINDINGS OF FACT

A. *The Defendants*

The Union, a constituent division of the International Union of Operating Engineers, is an unincorporated statewide labor organization which exists to establish and maintain collective bargaining agreements with various contractors in an effort to secure favorable wages, hours, and working conditions for workers within its jurisdiction. The Union had almost 6000 members at its peak, but currently has only about 3200 members. It has six districts statewide and maintains offices in each district with central administrative offices in New Orleans. The Lake Charles District includes the Parishes of Calcasieu, Cameron, Jefferson Davis, Beauregard, Allen and part of Vernon.

Peter Babin, III currently serves as the Business Manager and Financial Secretary of the Union, having been first elected to those offices in mid-1976. As Financial Secretary Babin has the responsibility of collecting union dues and paying union bills. As Business Manager he negotiates collective bargaining agreements with contractors within the state, serves on the committee negotiating the National Pipeline Agreement, serves as a trustee of the Union's Health and Welfare Fund, and acts as a delegate to various conventions, including the AFL-CIO convention. Babin also appoints assistant business managers (also known as "business agents" or "BA's") who operate the Union on a day-to-day basis in each of the districts.

Business agents appointed by Babin are authorized to represent the Union at pre-job conferences with contractors and in disputes between contractors and the Union or its members. Business agents have authority to appoint union stewards and master mechanics who act as union representatives on the job. Finally, business agents administer the exclusive job referral system through the hiring hall.

After appointing business agents, Babin testified that he instructed them to distribute job referrals on a nondiscriminatory basis and to avoid ownership of construction equipment. After several incidents of labor violence, Babin circulated to all business agents for their signature a memorandum informing them the Union would not be liable for unauthorized activity by business agents or union members.

Babin did very little to supervise his business agents, allowing them to run their respective district offices as they saw fit. Babin met with each business agent twice a year just before Executive Board meetings to discuss local problems. He had no formal procedure for evaluating a business agent's performance, relying instead upon the voting results of his bids for re-election. If the members of a particular district voted to re-elect Babin, he assumed his business agent for that district performed his duties satisfactorily. The court finds Babin's supervision totally inadequate.

Babin's predecessor, Jack Fisk, appointed defendant Willard Carlock, Sr. Business Agent for the Lake Charles District. When Babin became Business Manager, he retained Carlock, Sr. In the midst of criminal investigations into Carlock, Sr.'s administration of the Union's Lake Charles District, Babin fired Carlock, Sr. on March 10, 1984.

Babin appointed defendant Columbus J. ("C.J.") Laird Business Agent for the Lake Charles District in 1978. Although technically he had as much authority as Carlock, Sr., Laird considered Carlock, Sr. to be his boss and followed all of Carlock, Sr.'s directions. Laird remained in office until January 15, 1985, when he resigned after the government brought an indictment against him, Carlock, Sr. and others.

In March, 1980 Babin named Don Schiro statewide Pipe Line Business Agent. Schiro represented the Union in matters involving pipe line construction projects controlled by the National Pipe Line Agreement. As part of his duties, Schiro attended pre-job conferences with contractors on pipe line projects. Although he had ultimate responsibility for appointing stewards and referring operating engineers to pipe line jobs, Schiro generally left these details to district business agents like Carlock, Sr. and Laird.

In 1980 the Union membership elected Schiro as their President. As President Schiro receives no additional compensation from the Union (other than his salary as a business agent). The President's only duty is to preside over membership meetings held periodically in the various districts statewide.

B. *Labor Climate in Southwest Louisiana*

It is impossible to fully understand this case without some background knowledge of the environment within which Carlock, Sr. operated the Lake Charles District of the Union. Accordingly, upon the plaintiff's request pursuant to Fed.R.Evid. 201, the court takes judicial notice of the following facts generally known within this court's territorial jurisdiction.

Orgainized labor traditionally has had considerable political and economic power in Southwest Louisiana. During the OPEC nations' oil embargo of the 1970's, Louisiana's petroleum industry began to experience rapid growth which spilled over into other industries and created a high demand for labor. Local labor leaders used their control of the labor market to gain power over contractors and union employees. As labor shortages and the period's inflationary trends caused ever-increasing wages, union members perceived their local business agents as even more powerful. Political candidates recognized the considerable influence of business agents and depended upon their support for success.

Business agents continued to exercise their power virtually unheeded, creating an environment of labor unrest characterized by violence and corruption. Confrontations between the unions and contractors employing non-union labor climaxed with the "Ellender Bridge" incident of May 20, 1975 and the "Jupiter Chemical" incident of January 15, 1976. These incidents "contributed significantly to an atmosphere of violence and fear for union contractors and employees." *United States v. Carlock*, 806 F.2d 535, 539 (5th cir.1986) *cert. denied* ___ U.S. ___, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987) and ___ U.S. ___, 107 S.Ct. 1613, 94 L.Ed.2d 798 (1987). Carlock, Sr. and others were indicted, tried, and acquitted in state court for their alleged roles in the Ellender Bridge incident.

Allegations of corruption within the Union continued. Eventually a United States Senate Subcommittee and the Federal Burreau of Investigation ("FBI") launched investigations which led to the grand jury indictment, trial, and convictions of Carlock, Sr., Laird, and others of violating and conspiring to violate the Racketeer Influenced and Corrupt Organization Act, 28 U.S.C.A. § 1962(d)(1984).

Carlock, Sr. was also convicted of extortion in violation of the Hobbs Act, 18 U.S.C.A. § 1951 (1984), and of demanding and receiving illegal payments from employers in violation of the Taft-Hartley Act, 29 U.S.C.A. § 186 (1978). Additionally, Laird was convicted of one count of obstruction of justice.

During Carlock, Sr.'s term as business agent Babin occasionally received complaints from the union members concerning improprieties committed by Carlock, Sr. Babin testified that his investigations into such matters consisted of gathering all relevant facts from the person lodging the complaint, confronting Carlock, Sr. with the allegations, and receiving Carlock, Sr.'s explanation. Satisfied with the explanation, Babin would relay it to the complainant. Babin's "investigation" of a complaint meant only communicating with the subject and cause of the complaint. The court finds this totally inadequate.

C. Hiring Hall Procedure

The Union, as the exclusive collective bargaining agent for operating engineers seeking employment within its jurisdiction, entered into several collective bargaining agreements which goven the procedures to be used in employing operating engineers. An agreement between the Union and the Lake Charles District, Associated General Contractors of Louisiana, Inc. governs the building and construction trades industry (hereinafter referred to as the "Building Trades Agreement"). A second major agreement, the National Pipe Line Agreement, covers all transportation mainline pipe line and underground cable work.

Both agreements allow signatory contractors to hire directly qualified employees in certain circumstances.

The National Pipe Line Agreement permits contractors to fill up to approximately half the positions on a project with "regular employees." "Regular employees" are those regularly and customarily employed by the individual contractor whenever he has work or who have been employed by him sometime during the previous six months, and who, because of their special knowledge and experience in pipeline construction work, are considered "key men." These key men work on the "company half."

The Building Trades Agreement allows signatory contractors to recall for employment any operating engineer that contractor has employed for at least half the previous twelve months. Contractors signatory to this agreement may also hire directly key personnel, generally limited to foremen.

Laird, Schiro, and Sonny Maon, the current business agent in the Lake Charles District, never verified that individuals hired directly by contractors met the contractual requirements for direct employment, even though an operating engineer referred through the Union's hiring hall would replace any prospective employee disqualified from direct employment.

The Union furnishes all other operating engineers to pipe line and building trades contractors through an exclusive hiring hall. Both agreements establish a method for registering and ranking applicants for referral through the hiring hall. Applicants must be placed into four groups, each containing operating engineers of roughly equivalent work experience; however, the Union has always disregarded this rule, organizing the applicants into one group of journeyman operating engineers (while maintaining a separate group for oilers). Each district office maintains out-of-work lists containing names of all applicants in the

order each notifies the Union he is available for work. The Union maintains separate lists for building trades projects and pipe line projects. Since March, 1984, applicants could only have their names on one of the lists at a time.

When a contractor notifies the Union that it requires an operating engineer for a specific job, the business agent must contact qualified applicants for the job until the job is filled, starting with the first name on the proper out-of-work list. When contacted an applicant may either accept or decline a referral. An applicant who accepts a referral receives a referral slip signed by the business agent and identifying the contractor, job site, job type, wage rate, and date and time the applicant is to report. Once the applicant works forty hours, the business agent removes his name from the out-of-work list.[1] The applicant bears the responsibility of notifying the Union that he has worked over forty hours.

An applicant may decline a referral without penalty if he feels he is not qualified for the job offered. Under the provisions of the collective bargaining agreements, the business agent should move to the bottom of the out-of-work list the name of any applicant who arbitrarily refuses to accept a referral; however, Carlock, Sr. and Laird routinely allowed applicants to turn down shorter job referrals to hold out for longer, more lucrative ones.

The Union established by custom several exceptions to the general rule that job referrals are offered to applicants in the order their names appear on the out-of-work list. These exceptions are in addition to the contractors' right to hire employees directly under the circumstances discussed above.

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[1] For pipe line projects, an operating engineer's name was removed from the pipe line out-of-work list after he had worked fifty hours.

One exception involved referral of stewards to pipeline projects and master mechanics to building trades projects. Stewards and master mechanics act as union representatives at the job site. Frequently they are the people actually contacting the union hall for the contractor to request additional operating engineers, providing descriptions of the type of work to be performed and the expected duration of the job. On large projects, they must be versatile operators, capable of running several types of equipment, and able to fill in on a temporary basis for any operator who becomes incapacitated. They must be able to read and write so they can keep records and must have the even temperament required to work with management and resolve disputes which may arise.

Under the collective bargaining agreements, the Union has the right to designate a steward or master mechanic from the union members already referred to the project; however, Carlock, Sr., Laird and Schiro appointed stewards and master mechanics from individuals named on the out-of-work list, regardless of their position on the list. Schiro would sometimes appoint as a pipe line steward an individual who had a job on another project when the other project was nearing completion. To appoint as a steward an individual who is not even available for work when others are registered on the out-of-work lists clearly violates the Union's hiring hall procedure.

A second exception involved the referral of short-term jobs, i.e., those expected to last one to three days, based upon information provided by the contractor (or, frequently, the steward or master mechanic) requesting an operating engineer. By custom Carlock, Sr. and Laird handed these referrals to applicants present at the hall without regard to the applicants' positions on the out-of-work list. Carlock, Sr. and Laird never consulted the out-of-work lists

when making these referrals, unless two or more applicants desired the same referral.

Another exception allowed Carlock, Sr. and Laird to refer without reference to the out-of-work list a temporary replacement for any operating engineer who became incapacitated or otherwise unable to perform his job.

A final "exception" resulted from a collective bargaining agreement between the Union and Dolphin Construction Co. which required the Union to refer residents of Allen Parish to Dolphin's construction project there. Consequently, Allen Parish residents received referrals to that contractor ahead of otherwise equally qualified applicants living outside that parish whose names were higher on the out-of-work list.

D. Carlock, Sr's Abuse of the Hiring Hall Procedure

During the trial, Laird admitted several times that these exceptions gave Carlock, Sr. the power to enrich his allies and to starve his enemies within the Union by controlling their ability to obtain referrals for employment. After carefully considering the testimony of the witnesses, together with the pension fund records, out-of-work lists, and referral slips admitted into evidence, this Court is convinced Carlock, Sr. did in fact exploit and, at times, disregard entirely the hiring hall procedures to enrich his confederates to the detriment of the plaintiffs and others.

The court finds that Carlock, Sr. used several means to provide his confederates with regular employment in return for their support during a period when jobs were in high demand and short supply. The following is a brief discussion of some of these methods Carlock, Sr. used to by-pass the out-of-work list, i.e., to circumvent the general

rule that applicants for employment receive referrals in the order their names appear on the out-of-work list.

First, Carlock, Sr. repeatedly appointed his confederates stewards and master mechanics although many of those appointed lacked the skills necesary to properly perform the tasks of the position and although other equally or more qualified applicants had higher positions on the out-of-work list. Laird admitted that Michael Greer, Monroe Brabham, Pete Dartez, and Linda Young could not qualify as master mechanics but received referrals as such anyway. Carlock, Sr. forced contractors to accept unqualified individuals as master mechanics by threatening work slowdowns, work stoppages, and sabotage. The court notes that one contractor, Mar-Len Construction Co. tried to send back a master mechanic (Scimemi) for nine or ten months and finally succeeded only after halting construction on its project.

Second, Carlock, Sr. bypassed the out-of-work list to favor his confederates by exploiting the exception for referral of jobs lasting one to three days. The court recognizes that as a business agent Carlock, Sr. was familiar with the labor requirements of area construction projects. Carlock, Sr. personally visited the sites, talked with contractors' representatives, and received frequent reports from his stewards and master mechanics. The court concludes that Carlock, Sr. knew certain jobs would last substantially more than three days; nevertheless, he would refer his confederates to the jobs out of turn by designating the referrals as being for short-term jobs.[2]

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[2] The court notes with interest that plaintiff Jerry Hatch received some eighty-seven referrals between January 29, 1980 and April 26, 1983. Defendant's Exhibit 59. The vast majority of these were short-term jobs. An examination of these referrals and Hatch's pension fund records reveals that only one of the eighty-seven referrals contained an inaccurate estimate of job duration.

Next, according to Laird, one of easiest ways to bypass the out-of-work list was to obtain employment on the company half of a pipe line project. Laird pointed out that this required the business agent's cooperation (because only persons qualified as "regular employees" of the contractor were eligible for employment on the company half). The court finds Carlock, Sr., Laird, Schiro and even Mason gave the requisite cooperation by not confirming the eligibility of operators employed on the company half.

Finally, Carlock Sr. referred his confederates to contractors out of turn by designating the referral as a recall regardless of the individual's eligibility for recall.

Carlock, Sr. kept control over union members through intimidation and threats of retaliation in the form of economic discrimination and physical injury. The court notes testimony of an incident occurring during a union meeting. A union member demanded Carlock, Sr. take action as business agent to ensure that the wage rate the member was earning be increased to union scale. A fight developed and ended when Carlock, Sr. rammed the member's head into a wall.

Carlock, Sr. further discouraged open opposition by requiring members to vote at meetings by standing. The plaintiffs testified they feared voting against Carlock, Sr. publicly because they feared Carlock, Sr.'s retaliation.

Finally, Carlock, Sr. himself kept possession or control over the out-of-work lists,[3] which made it difficult for

[3] Often Carlock, Sr.'s secretaries had possession of the out-of-work lists, but would require Carlock, Sr.'s presence before allowing a member to personally examine the lists.

union members to discover improper referrals. Checking one's position on the list to challenge a referral meant confronting Carlock, Sr. directly.

E. Plaintiffs' Testimony

1. Howard Taliaferro

Howard Taliaferro joined the Union July 28, 1967 and remained a member until March 31, 1983, when he was suspended for non-payment of dues. On July 21, 1983 he was expelled. As an operating engineer, Taliaferro operated bulldozers, sidebooms, and other equipment but could not operate "claws" or cranes. Taliaferro also possessed the skills required of a steward—he could read and write, could operate several types of equipment, and knew the terms of the collective bargaining agreement sufficiently to enforce them.

Taliaferro did not support Carlock, Sr. throughout the latter's career as business agent. During the 1970's Taliaferro filed several complaints over the manner in which Carlock, Sr. administered the hiring hall procedures, objecting to Carlock, Sr.'s deviations from the terms of the collective bargaining agreement. In 1977 Taliaferro refused to contribute to Babin's re-election compaign when Carlock, Sr. solicited support. Taliaferro also declined to attend a barbecue fund raiser.

Taliaferro cooperated with the FBI during its criminal investigation of Carlock, Sr. in 1983. As a result, Taliaferro received threats warning him not to talk to the FBI or anyone else.

From late 1981 Taliaferro found little employment as an operating engineer. He signed the out-of-work list

December 4, 1981 and remained registered as available for work until March 15, 1982, when Laird removed Taliaferro's name after Taliaferro was working in Texas. In fact Taliaferro had found employment in the Dallas, Texas area, but his name should have remained on the list until April, 1982 when he first earned in excess of 50 hours working for Avery-Mayes Construction Co.

Taliaferro continued to work steadily in Texas until October of 1982. When he contacted the Union on October 12, 1982 to register as available for work, Laird incorrectly placed Taliaferro's name on only the pipe line out-of-work list rather than on both lists.

From October 12, 1982 until June, 1984 Taliaferro's name remained on the out-of-work list. During this period he applied for jobs with many union and non-union contractors and other businesses. In November of 1982 he received referrals from Local 714 in Texas for jobs lasting a total of 26.5 hours. In early 1983 he found short jobs with non-union employers, Golightly and Woodson Construction Company. The job for Woodson lasted around ten days, for which Taliaferro earned $1241. Taliaferro also declined referrals for a couple of jobs because he could not operate the equipment involved or because FBI Agent Steven Ek had advised him to do so.

While unemployed Taliaferro experienced serious financial hardships. In January, 1983 he made his last dues payment to the Union. Later that month his car was repossessed, limiting his capability to search for work.

Finally, In June, 1984 Laird referred Taliaferro to Sanders Hydrotesting Co., where he worked for 304 hours. He has not worked at the trade since, though he remains on the out-of-work list and would accept a referral if offered

one for a job for which he was qualified. Taliaferro has been receiving early retirement benefits since early 1985.

2. John C. Creel

John C. Creel joined the Union as a transfer from Local 675 in Florida in 1974. Creel operates various types of equipment, but primarily cranes. Finding little work, Creel withdrew from the Union in March, 1976 to practice as an electrician. At a chance meeting with Carlock, Sr. on a construction site in 1979, Creel learned that crane operators were in high demand, so he again sought admission to the Union.

Creel worked steadily from December 27, 1979 to March 9, 1982, working nearly 2000 hours in both 1980 and 1981. After March 9, 1982 Creel's fortunes changed drastically. Over the next twelve months he received eleven referrals to short jobs lasting an average of 21 hours and totaling 235 hours. Throughout this period Creel remained available for work, visiting the union hall four times a week to seek referrals.

Beginning in March of 1982 Creel complained to Carlock, Sr. and others about discrimination in the referral procedure and on one occasion presented Carlock, Sr. with a written complaint for filing with the grievance committee. Carlock, Sr. responded by tearing up the complaint and stating that he was the grievance committee. Creel also received several threats of personal injury to his family, and damage to his shrimp boat.

In 1983 Creel got one job with Roy B. Paul Construction Co. and worked for 445.5 hours, earning $6865. On September 20 of that year he and another plaintiff, Truman Johnson, were injured in an automobile accident and re-

mained unable to work until May, 1984. Since that time Creel has received one referral and worked 56 hours at the trade in May of 1986.

While searching for employment as an operating engineer Creel supplemented his net income from shrimping during 1984 at $7000. At present Creel practices as a real estate agent in Florida.

3. Jerry Hatch

Jerry Hatch, a man of fifty years and little or no formal education first became a member of the Union in 1964. Operating heavy equipment has been the only trade he has ever known. He testified that ever since Babin and Carlock, Sr. first took office, he has opposed them because of problems they caused within the Union. Hatch refused to pay $25.00 per week as demanded by Carlock, Sr.'s confederates for a legal defense fund to pay legal fees generated in Carlock, Sr.'s defense against state court criminal charges. Hatch also testified that he begged Babin to take some action to bring a solution to the internal problems in the Lake Charles District. In return for his opposition Hatch received threats by phone that his family would be killed. On one occasion Hatch received a call from his daughter, who tearfully reported a threat she had just received that she and her daughter would be killed. The stress on Hatch and his family contributed to a separation and divorce from his wife this past year.

From October, 1982 to October 4, 1984 Hatch has had only one long-term job. Hatch worked for R.B. Potashnik for 438 hours from January to March, 1983. Besides the Potashnik job, Hatch did work 122.5 hours on several short jobs, the longest lasting 22.5 hours. At all other times during this period Hatch remained available

for work. Hatch went to the hall five days per week seeking referrals. He declined only those referrals involving equipment he could not operate or involving jobs in the Oakdale, Louisiana area, Carlock, Sr.'s hometown.

On October 4, 1984 Hatch suffered a job-related injury and has been disabled ever since. He has been receiving disability and social security benefits, but hopes some day to have recovered sufficiently to resume working.

4. Truman Johnson

Truman Johnson, born February 6, 1950, had been a union member since August 12, 1973 and could operate all types of heavy equipment except large cranes. After October, 1982 Johnson's only employment was for R.B. Potashnik Construction Company, for whom he worked 709 hours between December 10, 1982 and March 23, 1983.

Johnson became disabled September 20, 1983 in an automobile accident. Except during the time he was employed by Postashnik, he spent nearly every day at the union hall seeking referrals. After the Potashnik job Johnson begged Babin to take some action to solve the problems in the Lake Charles District. Babin refused, explaining that Carlock was in charge.

Truman Johnson died on October 10, 1986. Charles Johnson, as administrator of the property of Truman Johnson's daughter, has been substituted as the proper party plaintiff.

5. Robert Guidry

Robert Guidry entered the Union in 1949. He operates almost all types of heavy equipment including

draglines, cherrypickers, large cranes, bulldozers and sidebooms, but does not operate any hydraulic equipment. He has worked as a steward on several jobs, all before 1969.

Guidry has a long history of opposing incumbent Union officers. In 1979 Guidry expected to receive his gold union membership card in recognition of thirty years membership in the Union. As a gold card holder Guidry would have been exempt from paying dues. Instead Guidry learned he had been suspended for non-payment of dues for eight months beginning July 31, 1955, the same time he had opposed the then-current business agent's re-election. Injured on the job, Guidry could not work at the time. During the 1950's business agents customarily collected contributions from the union membership to pay the dues of ill or injured members, but no contributions were collected for Guidry.

From September, 1979 to February, 1981 Guidry worked as the steward for Parsons—Gilbane Construction Company. After learning that a union member was paying Carlock, Sr. to keep his job, Guidry accompanied the member to report this to the FBI. Soon afterwards Carlock, Sr. tried unsuccessfully to have Guidry fired from the job. Guidry received threats, both by phone at night and in person at the job site. Three union members, confederates of Carlock, Sr., threatened Guidry's life during a conversation with him on the job site and subsequently were arrested by the FBI.

Guidry appealed to Babin in New Orleans and filed a complaint against Carlock, Sr. Guidry presented his case to the Executive Board at a hearing conducted in a Baton Rouge motel room near the Baton Rouge district office of the Union. The committee, headed by Babin, dismissed Guidry's charges.

After the Parsons job ended in February, 1981, Guidry found employment with various contractors until October, 1982. From October, 1982 to August, 1983 Guidry received a referral to Ford, Bacon & Davis Construction Company and made 253.50 hours.

Tetra Enterprises, Inc., a non-union employer gave Guidry his next job in August, 1983. Guidry had been receiving extended benefits under the federal unemployment compensation plan, having exhausted his state benefits. Two days later the union began picketing this job, creating a dilemma for Guidry. If he honored the picket line, he would again be unemployed and would lose his eligibility for extended benefits because he had refused available employment. On the other hand, by crossing the picket line Guidry risked losing his union membership. Economic pressure resulting from the discrimination within the hiring hall forced Guidry to cross the picket line and continue working.

In October, 1983 the Union filed charges against Guidry for crossing the picket line. At a union meeting in Lafayette the membership present voted to revoke Guidry's membership in the Union. Before the meeting Laird telephoned Carlock, Sr.'s supporters in the Union to assure their attendance and vote against Guidry.

Guidry had only one other job during 1983. On this job Guidry earned $1594.23 working for Harmony Corporation. In 1984 Guidry entered the trucking business transporting drilling tools and supplies to oil well locations. From this venture he earned $11,615.61 in 1984, $8776.06 in 1985 and $9342.11 in 1986.

6. Jess Rowsey

Jess Rowsey, born March 17, 1923, has operated heavy equipment since World War II. He joined the Union November 2, 1967 and has remained a member ever since. He can operate most types of equipment used on jobs in the Lake Charles area, and is at least as qualified to be a master mechanic as Linda Young and Willard Carlock, Jr., two of Carlock, Sr.'s confederates frequently appointed as master mechanics.

While Carlock, Sr. was business agent in Lake Charles, Rowsey never openly opposed him. In May 1979, Nathan Courville stewarded a job on which Rowsey worked. When Courville announced he was collecting $100 from each union member on the job for Carlock, Sr.'s legal defense fund, Rowsey paid almost immediately out of fear that otherwise he would be laid off. Later, Carlock, Sr. personally visited the job and warned Rowsey to keep quiet about the payment. Again to keep his job, Rowsey did as "requested."

At a union meeting in 1980 or 1981 Rowsey witnessed the explosiveness of Carlock, Sr.'s temper. Babin, Schiro, Carlock, Sr. and Laird all attended a meeting, sitting on a dais at the front of the crowd. Just before the meeting ended, J.D. Antley, a retired member of the Union, approached Carlock, Sr. and requested that his son, then an oiler, be issued an operator's book. When Carlock, Sr. refused, Antley responded that Carlock, Sr. had done the same thing before for others. Carlock, Sr. exploded, cursing Antley and physically accosting him. Union members from the crowd had to separate the two physically. Meanwhile Babin and Laird had taken no action and Schiro had only banged his gavel demanding order. Rowsey testified that the event left him shaken and fearful of Carlock, Sr.

In June, 1981, Rowsey testified in Monroe on behalf of Lamar Honey against the business agent from the Monroe district, Charles "Sub" Hayes. *See International Union of Operating Engineers, Local 406 v. N.L.R.B.*, 701 F.2d 504 (5th Cir. 1983). Since then Rowsey has experienced a great deal of trouble obtaining job referrals. In August of 1981 Rowsey received referrals to Industrial Construction Co., working only two hours, and to Ford, Bacon & Davis Construction Co., working 347.5 hours there.

During 1982 Rowsey did not receive a referral until September and worked a total of 108 hours. The court notes that Rowsey was not available for work during his wife's hospitalization from March to May of 1982. In 1983 his hours increased somewhat to 229 hours. Rowsey did not work at all in 1984, 1985, or 1986 forcing him to apply for his retirement benefits in December, 1984. He received his first retirement check May, 1985.

7. Vincent Reed

Vincent Reed first began working out of the Union in 1959 as an oiler. In 1960 he was injured and subsequently suspended from the Union. Near the end of 1978 Reed returned to the Union to seek employment through the hall. Carlock, Sr. exchanged a referral for $350 dollars in cash, delivered personally to Carlock, Sr. alone. Reed worked for Rimmer and Garrett Construction Company from March 1979 to the end of the year. The defendants offered no reasonable explanation for this payment; therefore, the court concludes the payment was a bribe. Certainly, Reed understood it to be such.

Eventually Reed also sought membership in the Union. Reed's testimony concerning payments Carlock, Sr.

demanded in return for membership and employment is somewhat confusing. It is apparent that Reed believed Carlock, Sr. demanded a series of bribes in return for membership; however, the court is satisfied that Reed's conclusions resulted from misunderstandings by both Carlock, Sr. and Reed. The court is satisfied that the facts are as follows:

In response to Reed's request for membership, Carlock, Sr. told Reed it would cost $1800. Apparently Carlock, Sr. believed Reed had been a member of the Union in 1960 and now wanted reinstatement. The $1800 represents back dues owed from 1960 to 1980. After Reed complained to Babin about Carlock, Sr.'s demand, the fact that Reed had never been a journeyman operator surfaced. Carlock, Sr. then initiated Reed as a new member, issuing him a permit until Reed paid five dollars per week for seventy-eight weeks, plus an initation fee and a building fund charge. Upon completion of these payments in April of 1980, Reed received a membership book.

After September, 1980 Reed received only three referrals. Through the first two referrals, both in 1982, Reed obtained employment lasting 244.4 hours. Reed's last referral from the Union came in January of 1983. From January to March, 1983 Reed worked 450 hours for R.B. Potashnik Construction Company. After March 1983, Reed only received offers to run equipment he couldn't operate, to work short jobs too far out-of-town to be financially attractive, or to work jobs too short to merit leaving the top of the out-of-work list.

8. Gene Romero

Gene Romero entered the Union on October 26, 1972. He primarily operates rubber-tire equipment, bulldozers,

and other dirt-moving equipment. Like the other plaintiffs, Romero opposed Carlock, Sr. On one occasion in 1983, a confederate of Carlock, Sr. requested that Romero contibute to Carlock, Sr.'s legal defense fund. Romero refused.

From 1979 to 1981 he worked over 2000 hours each year, but after that his hours fell sharply to 617.25 hours in 1982, 170 hours in 1983, 260 hours in 1984, and only 16 hours in 1985. When not working, Romero went to the union hall almost every day during the mornings to seek referrals.

9. Alton Janise

Alton Janise, born January 7, 1928, joined the Union in 1957. He has had several strokes, the first occurring in 1984. Since then he has been unable to work. His memory is very poor and he can no longer read.

Janise's pension fund records indicate that he worked the following hours:

	Hours
1980	1795
1981	2146.5
1982	733.5
1983	240
1984	0
1985	0

10. Craig Edwards

Craig Edwards entered the Union March 22, 1973. He is qualified to operate almost all kinds of heavy equipment except draglines. Since January 31, 1985 he has been suspended from the Union for non-payment of dues, but he

testified that he plans to pay the amount in arrears once he is financially able. In 1981 and 1982 he worked around 1100 hours. Then in 1983 his hours fell to 590.80 and in 1984 to 73.50.

Craig Edwards testified that on one occasion when he had become desperate for work, he sold Carlock, Sr. an air conditioning unit worth several thousand dollars. In return Craig Edwards received $200. and a job several days later. Craig Edward's testimony concerning this incident was supported by Roderick Edwards, Craig's brother who testified that he helped Craig deliver the air conditioner to Carlock, Sr.

In 1982 Craig Edwards received a referral to Nichols Construction Co. The job lasted 668.8 hours and carried over into April of 1983. Craig Edwards has not received any referrals through the hall since then, but did find a job with Industrial Construction Co. on his own operating a cherrypicker for 73.5 hours. He has maintained his name on the out-of-work list and has remained available for work.

11. Roderick Edwards

Roddy Edwards, Craig's brother, joined the Union in 1964. He operates several types of heavy equipment, including hydraulic equipment. Hostility between Roddy Edwards and Carlock, Sr. began around late 1982 or early 1983 when Roddy Edwards stopped receiving referrals. While he remained out of work, Carlock, Sr. provided his wife Beverly with referrals. As Carlock, Sr.'s "girlfriend," she sometimes had two jobs from the Union at the same time.

From May to October, 1982 Roddy Edwards worked for J.A. Jones Construction Co. He did not receive another

referral from the Union from then until the time he began serving a jail sentence in mid-1985.

12. Cary Vaughn

Cary Vaughn joined the Union as an oiler in 1968. As noted above, the Union maintaines a separate out-of-work list for oilers. In 1979 and 1980 Vaughn worked just over 1700 hours. In 1981 his hours fell to about 1000. Then in 1982 he worked only 395 hours, followed by 39 hours in 1983 and 181 in 1984.

Vaughn claims he was passed over on the out-of-work list in August of 1982. Allan Wayne Willard, who had registered as available for work on December 8, 1981, received a referral in August ahead of Vaughn who had registered November 23, 1981. But Vaughn testified that he had surgery to remove kidney stones about that time, and a notation indicating hospitalization follows his name on the August, 1982 out-of-work list. The court concludes Vaughn was not entitled to this referral because he was not available for work in August, 1982.

Around November 1, 1983 Vaughn was passed over on the out-of-work list for a referral to R.B. Potashnik Construction Co. Vaughn had registered as available for work October 31, 1982, but the referral went to Daniel Sonnier, who had signed the list April 8, 1983, The court is satisfied that Vaughn was available for work and would have accepted the referral had it been offered to him.

CONCLUSIONS OF LAW

The plaintiffs first claim the Union breached its fiduciary duty to represent them fairly because the Union operated its hiring hall in a discriminatory fashion. The

Labor Management Relations Act, 29 U.S.C.A. § 159(a) (1973), recognizes unions as exclusive bargaining agents for all persons within the bargaining unit and correlatively imposes upon the unions the duty to represent fairly the interests of each employee in the unit in dealings with the employer, *Smith v. Local No. 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir.1974).

[1] In order to fulfill its duty of fair representation, a union must enforce the provisions of a collective bargaining agreement in a non-discriminatory manner and represent all segments of the bargaining unit fairly. "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). In the context of distributing job referrals, a breach occurs if the Union applies "arbitrary and invidious criteria in referring employees to jobs." *International Union of Operating Engineers, Local 406 v. N.L.R.B.,* 701 F.2d 504, 508 (5th Cir. 1983).

[2] The evidence in this case demonstrates that the defendants Schiro, Laird, and Carlock, Sr. manipulated the referral system to deny the plaintiffs employment opportunities while favoring supporters of the Union's officers and business agents. Because these referrals (and denials) were based on arbitrary and invidious considerations of political support or opposition, each represents a breach of the Union's duty of fair representation.

The United States Supreme Court has held that a six-month statute of limitations period applies to all duty of fair representation actions. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 108 S.Ct. 2281, 76 L.Ed.2d 476 (1983). Each improper referral constitutes a

separate breach of the duty of fair representation and those breaches occurring more than six months prior to the institution of the suit are time-barred. *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d 570, 575 (6th Cir.1986). As this court has previously ruled, only those breaches of the duty of fair representation occurring within six months of the filing of suit are actionable.

[3] The plaintiffs introduced testimony concerning a vast number of referrals which they claim demonstrate discriminatory distribution of referrals through the hiring hall. After studying the testimony of the witnesses and the exhibits admitted into evidence, the court is satisfied that all of the plaintiffs have proven repeated abuses of the hiring hall procedure by the Union's business agents. The plaintiffs are entitled to recover loss of wages for all breaches occurring after the date six months prior to the date each plaintiff filed suit. The essential facts of each improper referral have been compiled and placed in the Appendix.

[4] The plaintiffs also have made claims under the Labor-Management. Reporting and Disclosure Act ("LMRDA"), 29 U.S.C.A. §§ 401 to 531 (1985). The "Bill of Rights" section of this Act guarantees union members, among other protections, equal rights to vote and otherwise participate in union deliberations, 29 U.S.C.A. § 411(a)(1) (1985), as well as the rights of free speech and assembly, 29 U.S.C.A. §411(a)(2) (1985). Section 411(a)(5) protects union members from being disciplined without a full and fair hearing and Section 529 prohibits unions and their officers or agents from disciplining any union member for exercising his rights guaranteed by the LMRDA.

These sections were designed "to protect the rights of union members to discuss freely and criticize the

management of their unions and conduct of their officers. The purposes of these sections is to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain. *Archibald v. Local 57, International Union of Operating Engineers,* 276 F.Supp. 326, 329 (D.R.I.1967).

Manipulation of hiring hall procedures to suppress participation in union activities and opposition to union management and policies constitutes violations of § 411(a)(1) and (2). *Murphy v. International Union of Operating Engineers, Local 18,* 774 F.2d 114, 123 (6th Cir.), *cert.denied* ____ U.S. ____, 106 S.Ct. 1201, 89 L.Ed.2d 315 (1986). The court finds that the Union, Carlock, Sr., Laird, and Schiro, manipulated the hiring hall procedure to suppress opposition from union members, particularly the plaintiffs. The court finds further that Carlock, Sr. employed threats and intimidation to curtail the plaintiff's exercise of their rights to freedom of speech and assembly.

Sections 411(a)(5) and 529 protect union members from unlawful discipline. A union subjects a member to "discipline" under §§ 411 and 529 "when (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership, and (2) it directly penalizes him in a way which separates him from comparable members in good standing." *Keene v. International Union of Operating Engineers, Local 624,* 569 F.2d 1375, 1379 (5th Cir.1978).

Discrimination in job referrals constitutes discipline when used as a tool by union leaders to control union affairs in violation of a worker's membership rights. *See Vandeventer v. Local Union No. 513, International Union of Operating Engineers,* 579 F.2d 1373, 1378-79 (8th Cir.),

cert. denied, 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978). This court has no trouble finding that the defendants violated sections 411(a)(5) and 529 by limiting the employment opportunities made available to the plaintiffs to penalize them for refusing to support the defendants and for openly opposing them.

[5] Suits brought under the LMRDA are subject to a six-month limitations period. *Local 1397, United Steelworkers of America*, 748 F.2d 180 (3rd Cir.1984). As this court has already ruled, the plaintiffs may only recover for those violations of the LMRDA occurring after the date six months prior to when the plaintiffs filed suits.

[6] Having found that all of the plaintiffs but Vaughn have proven breaches of the Union's duty of fair representation and violations of the LMRDA, the court must next address the remedies available to the plaintiffs. As recovery for breach of the duty of fair representation, the plaintiffs are entitled to recover their loss of wages. The LMRDA, 29 U.S.C.A. §412(1985) permits a court to award "such relief . . . as may be appropriate." As discussed below the court holds that in these actions appropriate relief must include, in addition to loss of wages, mental suffering, punitive damages, and attorney's fees. Additionally, the court holds that Guidry is entitled to reinstatement of full membership in the Union upon full payment of past dues.

Each of the plaintiffs is entitled to recover his lost wages caused by the discriminatory operation of the hiring hall. The plaintiffs need not prove these amounts with mathematical certainty. *Keene v. International Union of Operating Engineers, Local 624*, 569 F.2d 1375, 1382 (5th Cir.1978). As reasonable compensation the court will award the difference between the amount each plaintiff would

have earned had the hiring hall been operated in a non-discrinatory fashion less the amount each actually earned from referrals through the Union. The court calculates the former amount by multiplying the average number of hours worked by operating engineers actively seeking employment and their hourly rate of pay. The parties have stipulated that the hourly rate to be used is $13.00.

The court accepts the testimony of the defendants' expert concerning the average number of hours worked by operating engineers actively seeking employment during the years 1981-1983. In calculating the average hours worked during 1984, the court has assumed that the yearly averages continued to decrease in 1984 at the same rate as in 1982 and 1983. Accordingly, the average number of hours worked by operataing engineers actively seeking employment during 1981-1984 is as follows:

	Average Hours
1981	1500.
1982	879
1983	516
1984	302

Taliaferro has demonstrated that the hiring hall was operated in a manner which discriminated against him as early as January 5, 1982 (*See* Appendix) and continued until at least March 10, 1984 when Carlock, Sr. was fired. Taliaferro filed suit February 7, 1983 and, therefore, may recover lost wages from August 7, 1982, six months prior to the filing date, to March 10, 1984.

To calculate Taliaferro's lost wages, the court must first calculate the earnings of the average operating engineer actively seeking employment from August 7, 1982 through March 10, 1984. Such a person could expect to

have worked 351.6 hours in 1982 after August 7th (146 days after August 7, 1982, divided by 365 days in 1982, multiplied by 879 hours worked in 1982 on average), 516 hours in 1983, and 58.6 hours in 1984 up to March 10, for a total of 926 hours. His compensation for the period (at $13.00 per hour) would equal $12,038. The amount represents the income Taliaferro could expect to have earned through the Union if the hiring hall had been operated fairly. It does not include outside income he could expect to have earned during periods of being on the out-of-work list awaiting a referral.

Next the court must calculate and deduct Taliaferro's actual earnings from referrals through the Union during the same period. His pension records reflect that he worked an estimated 374.5 hours[4] in 1982 after August 7th and zero hours in 1983 and early 1984. Taliaferro's earnings from union jobs totaled $4868.50; therefore, his award for lost wages equals $7169.50.

The court notes that during 1983 Taliaferro earned $1241 from Woodson Construction Company, a non-union employer. This amount should not be deducted as mitigation of damages because it represents an amount Taliaferro probably would have earned even if the Union had operated the hiring hall properly. In such a case Taliaferro would still have been without employment through the Union for almost nine months because even without discrimination in the hiring hall, operating engineers could be expected to work an average of only 516 hours at jobs obtained through

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[4] This number reflects an estimate of the hours worked in August after August 7th. Taliaferro's records indicate he worked 174.5 hours for the month of August. The court estimates that 135 of those were after August 7th (24 days after August 7th/31 days in August × 174.5 hours in August = 135 hours after August 7th).

the union. During periods of unemployment, the court could reasonably expect Taliaferro to explore employment opportunities outside the Union.

Creel proved discrimination in the hiring hall against him as early as April 2, 1982 (*See* Appendix) and continuing until September 20, 1983 when he became unable to work as a result of an auto accident. Creel filed suit April 29, 1983 and, therefore, may recover lost wages occurring after October 29, 1982. From October 29, 1982 to September 20, 1983, the average operating engineer could be expected to work 523.5 hours and earn $6805.50 from jobs obtained through the Union. During the same period Creel actually worked an estimated 515 hours and earned $6695. His total award for lost wages equals $110.50.

Hatch is entitled to recover for lost wages accruing from October 29, 1983 (six months before he filed suit) through March 10, 1984 (the date Carlock, Sr. was fired). The average hours operating engineers actively seeking employment could expect to have worked during this period is 726. During the same period Hatch received referrals through the Union for jobs where he worked a total of only 540 hours. Hatch's lost earnings, therefore, total $2418.

Johnson, who also filed suit April 29, 1983, is entitled to recover lost wages from October 29, 1983 until September 20, 1983, the date he suffered disabling injuries in an automobile accident. During those dates the average hours worked by operating engineers seeking employment equalled 523.5 hours. Johnson, however, worked a total of 711 hours during that time; therefore, although business agents operated the hiring hall syatem unfairly and at times passed over Johnson when making referrals, he still received enough referrals to allow him to work more hours

than average. Thus, he did not suffer any lost wages.

Guidry filed suit May 11, 1983 and may recover lost wages accruing from November 11, 1982 until March 10, 1984. Between those dates the average hours worked was 695, while Guidry actually worked only 286.5 hours on jobs to which he received referrals from the Union. His lost wages total $5310.50. Again, his earnings from sources other than the Union do not mitigate his losses because he would have had full opportunity to work on these jobs even absent discrimination within the hiring hall procedure.

Prior to the conclusion of trial, the parties stipulated to the amount of lost wages to which the remaining plaintiffs would be entitled in the event the court ruled in their favor. Having ruled in their favor, the court will award damages for lost wages to these plaintiffs in the following amounts:

Rowsey	$2000
Reed	2500
Romero	2500
Janise	1000
C.Edwards	300
R.Edwards	500
Vaughn	1000

In actions brought under the LMRDA, damages for emotional distress are recoverable. *Bise v. International Brotherhood of Electrical Workers, Local 1969*, 618 F.2d 1299 (9th Cir.1979), *cert. denied* 449 U.S. 904, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980). But, "emotional distress, standing alone, does not constitute a sufficient basis for the awarding of damages under the [LMRDA]." *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers & Helpers v. Rafferty*, 348 F.2d 307,

315 (9th Cir.1965). Johnson, therefore, is not entitled to an award for emotional distress because he did not prove any lost wages.

Each of the plaintiffs clearly has suffered emotional distress as a result of the actions of the defendants. Because they opposed Carlock, Sr., they lost the opportunity to provide a livelihood for themselves and their familes through the Union. Most of these plaintiffs have little formal education, which limited their opportunities for alternative sources of income. These plaintiffs suffered all the humiliation and anguish associated with financial hardship.

In addition to economic discrimination and intimitation, the plaintiffs were subjected to physical intimidation by Carlock, Sr. and his confederates. They and their families received threats of personal injury and of damage to their property. Needless to say, the defendants' actions placed the plaintiffs and their families under an enormous strain. The court has covered all of the actions of the defendants which caused this mental and emotional distress in its discussions of the plaintiffs' testimony and will not repeat it here.

After considering the mental pain and suffering of each plaintiff, the court holds each is entitled to compensation for emotional distress in the following amounts:

Taliaferro	$20,000
Creel	5,000
Hatch	5,000
Johnson	1,000
Guidry	20,000
Rowsey	1,000
Reed	1,000

Romero	1,000
Janise	1,000
Craig Edwards	1,000
Roderick Edwards	1,000
Vaughn	1,000

To fashion the appropriate relief to which Guidry is entitled under the LMRDA, the court finds it necessary to order Guidry's reinstatement as a member of the Union. In *Kuebler v. Cleveland Lithographers & Photoengravers Union Local 24-P,* 473 F.2d 359 (6th Cir. 1973), the court ordered the reinstatement of a union member who was expelled for attending a meeting to discuss the lack of progress in negotiations between labor and management during a strike. First, the court found that disciplining the union member violated the LMRDA because the LMRDA guarantees a union member's right to assemble. 29 U.S.C.A. § 411(a)(2) (1985). Second, the court found that the expulsion violated 29 U.S.C.A. § 411(a)(5) (1985) because the union member did not receive a full and fair hearing before an impartial tribunal. In *Kuebler* the parties who had investigated the charges against the union member composed the tribunal which decided his case.

Guidry's expulsion from the Union for crossing a Union picket line also violated the LMRDA. As recognized by the court in *Kuebler,* 29 U.S.C.A. § 411(a)(5) (1985) entitles union members to a full and fair hearing before an impartial tribunal. Guidry was expelled by a vote of Union members present at a meeting in Lafayette called to decide Guidry's fate. This tribunal was far from fair and impartial because prior to the meeting Laird contacted those area union members he could trust to vote against Guidry and obtained their attendance at the meeting to ensure that Guidry would be expelled.

Guidry's expulsion also was a direct result of the economic discrimination directed against him by Carlock, Sr. Guidry's expulsion occurred after he crossed a picket line to work for Tetra Enterprise, Inc. in August 1983. Prior to this job Guidry had received only one job referral from the Union and had worked only 253.5 hours in 1983. Financial hardships resulting from economic discrimination forced Guidry to accept employment with a non-union employer and cross the Union's picket line. Because Guidry's expulsion resulted from the Union's violations of the LMRDA, the court believes it appropriate to require Guidry's reinstatement to full membership in the Union. The court will also issue an order prohibiting the Union from further disciplining Guidry for crossing the Union's picket line at the Tetra Enterprise, Inc. jobsite.

The court next addresses the issue of whether punitive damages should be awarded in the present case. As the defendants have repeatedly pointed out, the United States Supreme Court has announced a *per se* ban on punitive damage awards in cases based on breach of the duty of fair representation. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). Thus, this court may not award punitive damages in this case for the defendants' violations of the duty of fair representation.

The plaintiffs in the present case have also proven violations of the LMRDA. The Supreme Court's decision in *Foust* expressly left open the question whether punitive damages were proper in LMRDA cases. *Foust*, 442 U.S. at 47 n. 9, 99 S.Ct. at 2125 n. 9. The United States Court of Appeals for the Fifth Circuit has held both before and after *Foust* that punitive damages may be awarded under the LMRDA where the union acted with "actual malice or reckless or wanton indifference to the rights of the plain-

tiff." *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir.) *cert. denied* 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed.2d 854 (1968); *Parker v. Local Union No. 1466, United Steelworkers of America*, 642 F.2d 104, 106 (5th Cir. 1981).

The plaintiffs have shown they are entitled to punitive damages in the present case. The evidence is clear that Carlock, Sr. acted with actual malice in violating the plaintiffs' right secured by the LMRDA. Babin and Laird demonstrated their wanton indifference to the plaintiffs' rights by taking no meaningful action to correct an intolerable situation of which they were both fully aware.

In assessing punitive damages against a defendant, the court must be mindful of the purpose of such an award. The awarding of punitive damages in appropriate cases serves as a determent to those abuses which Congress sought to prevent when it passed the LMRDA.

> Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members. . . . The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.

Braswell, 388 F.2d at 200, *quoting Fittipaldi v. Legassie*, 18 A.D.2d 331, 239 N.Y.2d 792, 796 (1963).

In deciding the proper amount of punitive damages to assess against the Union, this court specifically notes two important considerations. First, the defendants acted intentionally. Secondly, the court recognizes the individual union member's reluctance to challenge union business agents and other officers when the member's rights are violated because these officials exercise nearly complete control over the member's means of earning a livelihood. For all of the above reasons, the court assesses $120,000 in punitive damages to be paid by the Union, $10,000 to be paid to each plaintiff.[5]

This court also is very concerned with the role Babin has played in the events leading to the present causes of action and will play in Union affairs in the future. Babin had the authority and the duty to direct the actions of the other individual defendants in this case. The evidence shows he failed to properly supervise his business agents and failed to meaningfully investigate complaints received from union members. Babin remains the current Business Manager, and the testimony of Schiro and Mason indicates that Babin has not improved the quality of his supervision. Both Schiro and Mason testified that no one directly supervises their activities. Rather, they perform under an "honor" system. For these reasons, in addition to those discussed above, the court assesses punitive damages

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[5] Johnson is entitled to recover punitive damages. By proving the Union violated his rights under the LMRDA, he established his *right* to compensatory damages. Although he failed to prove any compensatory damages, he may recover punitive damages to vindicate the invasion of his protected rights and as a deterrence against future violations. *Braswell*, 388 F.2d at 199. *Bise*, 618 F.2d at 1305.

against Babin in the amount of $12,000, $1,000 to be paid to each plaintiff.

Both Carlock, Sr. and Laird were fired after the illegality of their activities came to light during FBI and Senate investigations. Subsequently, each was convicted and sentenced to prison for various crimes stemming from their operation of the Lake Charles district office. The court sees little prospect for their ever attaining positions of responsibility within the Union in the future. Because an assessment of punitive damages against these individuals would serve no useful purpose, the court will not now make such an assessment.

Finally, the plaintiffs seek recovery of reasonable attorney's fees. Even "in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *Hall v. Cole,* 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). Federal courts may award attorney's fees to a successful party: (1) when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or (2) where his successful litigation confers substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. *Hall,* 412 U.S. at 5, 93 S.Ct. at 1946. The court finds an award of attorneys' fees justified under both theories.

The court has already found the Union, through its officers, acted in bad faith, wantonly and malicious. This conduct justifies shifting the burden of the plaintiffs' attorney' fees to the Union.

The court also finds that by vindicating their own

rights guaranteed by the LMRDA, the plaintiffs have rendered a substantial benefit to all members of the Union. This litigation has served to protect the rights of all Union members to be free from discrimination in the operation of the hiring hall by providing substantial deterrence from such conduct in the future. This litigation has also contributed to the preservation of union democracy by preserving the rights of all union to voice opposition to incumbent union officials without fear of reprisal. Because all Union members share in the benefits of this litigation, it is only fair that they share in its costs.

CONCLUSION

For the reasons assigned above, the court rules in favor of plaintiffs. The court will render separate judgments in each of these action reflecting its findings in this litigation.

APPENDIX

1. November 30, 1981—Carl Beaugh was referred to Mar-Len Construction Co. for a one week job that lasted 235 hours. Beaugh signed the out-of-work list November 23, 1981 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981

2. December 4, 1981—Mike Duplechain was referred to IMC to operate a cherry picker one week. The job lasted 480.9 hours. He signed the out-of-work list December 2, 1981 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
C. Edwards	December 1, 1981
Hatch	December 1, 1981

3. December 10, 1981—David George was referred to Bechtel for a 3-4 day job that lasted 802.75 hours. He signed the out-of-work list December 8, 1981 and jumped;

Reed	October 6, 1980
R. Edwards	November 23, 1981
C. Edwards	December 1, 1981
Hatch	December 1, 1981
Johnson	December 8, 1981

4. January 5, 1982—Carl McNabb was referred to J.A. Jones as a master mechanic for a job lasting 1974.5 hours. He had not signed the out-of-work list and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
C. Edwards	December 1, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981
Rowsey	December 10, 1981
Guidry	December 15, 1981
Romero	December 17, 1981
Janise	December 17, 1981

5. February 8, 1982—Edward Kemp was referred to ECI for a 1-2 day job that lasted 319 hours. He signed the out-of-work list December 22, 1981 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
C. Edwards	December 1, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981
Rowsey	December 10, 1981
Guidry	December 15, 1981
Romero	December 17,1981
Janise	December 17, 1981

6. December 10, 1981—Wyatt Trahan was referred to Industrial Construction Co. to operate a cheery picker for the duration of the job, which lasted over 4000 hours. He signed the out-of-work lists December 10, 1981 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
C. Edwards	December 1, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981

7. February 15, 1982—Howard Wash was referred to ECI Engineering Co. as a grease foreman for a 2 to 3 day job that lasted 400.5 hours. He signed the out-of-work list on January 28, 1982 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981
Rowsey	December 10, 1981
Guidry	December 15, 1981
Janise	December 17, 1981
Hatch	January 22, 1982

8. February 15, 1982—Clyde Shearin was referred to ECI Engineering Co. for a job that lasted 197 hours. He signed the out-of-work list January 28, 1982 and jumped:

Reed	October 6, 1980
R. Edwards	November 23, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981
Rowsey	December 10, 1981
Guidry	December 15, 1981
Janise	December 17, 1981
Hatch	January 22, 1982

9. February 22, 1982—Carl Beaugh was referred to American Fabricators to operate a cherry picker for one week. The job lasted 217 hours. He signed the out-of-work list January 11, 1982 and jumped:

Reed	October 6, 1981
R. Edwards	November 23, 1981
Johnson	December 8, 1981
Taliaferro	December 8, 1981
Rowsey	December 10, 1981
Guidry	December 15, 1981
Janise	December 17, 1981

10. April 2, 1982—Andy Chicano was referred to ECI Engineering as a heavy duty operator for the duration of the job, which lasted 190.5 hours. He signed the out-of-work list March 15, 1982 and jumped:

R. Edwards	November 23, 1981
Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 28, 1982

Janises	March 9, 1982
Creel	March 15, 1982

11. April 19, 1982—Clyde Shearin was referred to J.S. Jones as a master mechanic for a one month job which lasted 782 hours. He has originally signed the out-of-work list December 8, 1981 and was removed when he worked from February 1982 to April 1982. He should have returned to the list at April 16, 1982. He jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982
Reed	March 16, 1982

12. April 26, 1982—Howard Wash was referred to IMC to operate a cherry picker for the duration of the job, which lasted for 215 hours. He signed the out-of-work list April 16, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982
Reed	March 16, 1982

13. May 10, 1982—Mike Duplechain was referred to Vincent Construction as a unit operator for a one week job which lasted 695 hours. He signed the out-of-work list April 5, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982

Creel	March 15, 1982
Reed	March 16, 1982

14. May 25, 1982—Carl Beaugh was referred to Augenstine to operate a cherry picker for a one day job which lasted 652 hours. He had originally signed the out-of-work list April 5, 1982 but his name should have gone to the bottom of the list because he worked two jobs, both of which lasted over 40 hours. He jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982
Reed	March 16, 1982
C. Edwards	April 23, 1982
Romero	May 11, 1982

15. May 16, 1982—David George was referred to SIPI to operate a cherry picker for a two to three week job which lasted 1178.25 hours. He signed the out-of-work list May 5, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982
Reed	March 16, 1982
C. Edwards	April 23, 1982

16. June 8, 1982—Howard Wash was referred to White for a one to two week job. He signed the out-of-work list June 1, 1982 and jumped:

Johnson	December 8, 1981

Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982

17. June 14, 1982—Winston Carlock was referred to J.A. Jones to operate a cherry picker for the duration of the job which lasted 108 hours. He signed the out-of-work list June 14, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 23, 1982
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982

18. June 22, 1982—Howard Wash was referred to Sauer to operate a cherry picker for the duration of the job which 172 hours. He signed the out-of-work list June 14, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Hatch	January 20, 1982
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982

19. July 28, 1982—Howard Wash was referred to Riggers as a mechanic for a one week job which lasted 60 hours. He had not signed the out-of-work list and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982

Reed	March 16, 1982
Romero	May 11, 1982
C. Edwards	July 20, 1982

20. July 28, 1982—Edward Kemp was referred to Ford, Bacon & Davis to operate a cherry picker for a two week job which lasted 134 hours. He had not signed the out-of-work list and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982

21. August, 1982—Grady Cauthron was referred to Reading & Bates, where he worked 533 hours. He signed the out-of-work list July 2, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982

22. August, 1982—Mike Duplechain was referred to Reading & Bates and worked 343 hours. He has not signed the out-of-work list and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982
C. Edwards	August 17, 1982

23. August 24, 1982—Linda Young was referred to Sauer to operate a cherry picker for a two day job which lasted 1012 hours. She signed the out-of-work list July 6, 1982 and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982

24. August 25, 1982—Winston Carlock was referred to Prepakt to operate a grout pump for one to two weeks. The job lasted 61 hours. Carlock had not signed the out-of-work list and jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982
C. Edwards	August 17, 1982

25. September 2, 1982—Edward Kemp was referred to Andreco to operate a fork lift for one day. The job lasted 416.5 hours. Kemp had not signed the out-of-work list. He jumped:

Johnson	December 8, 1981
Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982
Janise	August 26, 1982
Hatch	August 27, 1982

26. September 8, 1982—Clyde Shearin was referred to Process Piping as a master mechanic on a job which lasted 144 hours . He had not signed the out-of-work list and he jumped:

Rowsey	December 10, 1981
Creel	March 15, 1982
Reed	March 16, 1982
Romero	May 11, 1982
Janise	August 26, 1982
Hatch	August 27, 1982

27. September 20, 1982—Howard Wash was referred to Process Piping as a master mechanic for a two to three day job which lasted 762.5 hours. He had not signed the out-of-work list and jumped:

Johnson	December 8, 1981
Creel	March 15, 1982
Romero	May 11, 1982
Janise	August 26, 1982

28. October 26, 1982—Clyde Shearin was referred to Marley Cooling Towers to operate a cherry picker for a one week job which lasted 272 hours. He signed the out-of-work list October 11, 1982 and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Hatch	September 24, 1982
Rowsey	September 28, 1982
Reed	October 4, 1982

29. December 6, 1982—Carl McNabb was referred to Industrial Construction Co. for a two to three day job

as a unit operator. The job lasted 411 hours. He signed the out-of-work list December 2, 1982 and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Hatch	September 24, 1982
Rowsey	September 28, 1982
Reed	October 4, 1982
C. Edwards	October 12, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

30. January 7, 1983—Clyde Shearin was referred to Jacobs and Wiese as a master mechanic on a job which lasted 957 hours. He signed the out-of-work list December 15, 1982 and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Hatch	September 24, 1982
Rowsey	September 28, 1982
C. Edwards	October 12, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

31. January 11, 1983—Winston Carlock was referred to Jacobs and Wiese to operate a cherry picker for a one to two day job which lasted 326 hours. He had not signed the out-of-work list and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Hatch	September 24, 1982
Rowsey	September 28, 1982
C. Edwards	October 12, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

32. January 17, 1983—David George was referred to WEBCO as a relief operator for one to two days. The job lasted 196 hours. He had not signed the out-of-work list and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Rowsey	September 28, 1982
C. Edwards	October 12, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

33. January 25, 1983—Edward Kemp was referred to Nicholls Construction Co. to operate a cherry picker for a one to day job which lasted 115 hours. He had not signed the out-of-work list. He jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Rowsey	September 28, 1982
C. Edwards	October 12, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

34. January 26, 1983—Andy Chicano was referred to NADCO as a mechanic for one to two days. The job lasted 1257 hours. Chacano signed the out-of-work list January 18, 1983 and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

35. February 6, 1983—Houston Byrd was referred to SIPI to operate a cherry picker on a two to three day job which lasted 289.5 hours. He signed the out-of-work list October 11, 1982 and jumped:

Creel	March 15, 1982
Janise	August 26, 1982
Rowsey	September 28, 1982

36. February 10, 1983—Carl McNabb was referred to NADCO to operate a cherry picker for a one to two day job which lasted 471 hours. He signed the out-of-work list February 9, 1983 and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

37. February 15, 1983—Howard Wash was referred to Jacob & Wiese to operate a backhoe for a one-day

job which lasted 272 hours. He signed the out-of-work list February 9, 1983 and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

38. March 1, 1983—Edward Kemp was referred to Petro-Chemical to operate a cherry picker on a two to three day job which lasted 56 hours. He had not signed the out-of-work list and he jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

39. March 1, 1983—Melvin Duplechain was referred to Petro-Chemical to operate a cherry picker for a two to three day job which lasted 377 hours. He signed the out-of-work list September 9, 1982 and jumped:

Janise	August 26, 1982

40. March 4, 1983—Mike Duplechain was referred to Nichols to operate a crane for a three to four day job which lasted 207 hours. He had not signed the out-of-work list and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982

Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

41. March 4, 1983—Grady Cauthron was referred to Nichols as a master mechanic for a four-week job. He signed the pipeline out-of-work list February 7, 1983 and jumped:

Taliaferro	October 13, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

42. March 7, 1983—Howard Wash was referred to NADCO as a master mechanic for a one to two day job which lasted 222.5 hours. He signed the out-of-work list March 2, 1983 and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

43. March 11, 1983—Edward Kemp was referred to Vincent Construction Co. as a cherry picker operator for a one to two day job which lasted 103 hours. He had not signed the out-of-work list and he jumped:

Janice	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982

Romero	November 2, 1982
Guidry	September 9, 1982
R. Edwards	November 15, 1983

44. March 21, 1983—Elmer Grantham was referred to Dolphin Construction Co. for the duration of the project and worked 496 hours. He signed the out-of-work list on March 19, 1983 and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982

45. April 4, 1983—Willard Carlock, Jr. was referred to Industrial Construction Co. as a master mechanic and worked 226 hours. He signed the out-of-work list October 4, 1982 and jumped:

Janise	August 26, 1982
Rowsey	September 28, 1982

46. April 5, 1983—Linda Young was referred to Ellerbe Construction Co. and worked 928 hours. Her referral slip indicated employment by recall, but her employment records show she was ineligible for recall by Ellerbe, having last worked for this employer in May of 1982 for 52 hours. She signed the out-of-work list March 14, 1983 and jumped:

Janise	August 26, 1982
Rowsey	September 28o, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982

Guidry	November 9, 1982
R. Edwards	November 15, 1982

47. April 19, 1983—Edward Kemp was referred to Dolphin Construction Co. to operate a dozer for the duration of the job which lasted 101.5 hours. He had not signed the out-of-work list and jumped:

Rowsey	September 28, 1982
Taliaferro	October 12, 1982
Romero	November 2, 1982
Guidry	November 9, 1982
R. Edwards	November 15, 1982
Hatch	March 16, 1983
Reed	March 17, 1983
Johnson	March 23, 1983
C. Edwards	April 4, 1983
Janise	April 15, 1983

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
SEP 09 1987

ROBERT GUIDRY	:	
	:	
VS	:	CIVIL ACTION
	:	NO. 83-1141-LC
	:	(Judge
INTERNATIONAL UNION OF	:	Earl E. Vernon)
OPERATING ENGINEERS,	:	
LOCAL 406, ET Al	:	

JUDGMENT

After trial of this matter, the court has this date rendered its Opinion. In accordance with that Opinion, it is hereby:

ORDERED, ADJUDGED AND DECREED THAT THERE BE JUDGMENT IN FAVOR OF PLAINTIFF ROBERT GUIDRY, SR. and against defendants INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406; WILLARD S. CARLOCK, SR.; COLUMBUS J. LAIRD; PETER BABIN, III; and DON SCHIRO in the amount of FIVE THOUSAND THREE HUNDRED TEN AND 50/100 DOLLARS ($5,310.50) for loss wages and TWENTY THOUSAND DOLLARS ($20,000) for mental pain and suffering.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of ROBERT

GUIDRY, SR. and against INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406 awarding punitive damages in the amount of TEN THOUSAND DOLLARS ($10,000) and that there be judgment in favor of ROBERT GUIDRY, SR. and against PETER BABIN, III awarding punitive damages in the amount of ONE THOUSAND DOLLARS ($1,000).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of ROBERT GUIDRY, SR. and against INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406 awarding the plaintiff reasonable attorneys' fees in an amount to be agreed upon by the parties. If agreement cannot be reached, the court will set a hearing to decide the matter at a later date.

IT IS FURTHER ORDERED that INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406 reinstate ROBERT GUIDRY, SR. of full union membership upon payment by ROBERT GUIDRY, SR. of all back dues, and that INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406 be prohibited from bringing further disciplinary actions against ROBERT GUIDRY, SR. for his crossing a union picket line in August, 1983.

THUS DONE AND SIGNED at Lake Charles, Louisiana this 9th day of September, 1987.

/s/ Earl E. Veron

EARL E. VERON
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
SEP 26 1989

No. 87-4733

ROBERT GUIDRY,

Plaintiff-Appellee
Cross-Appellant,

versus

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL.,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 29, 5 Cir., 1989, _____F.2d____)

(SEPTEMBER 28, 1989)

Before RUBIN, GARZA and KING, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggesstion for Re-hearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/Illegible

United States Circuit Judge

APPENDIX H

RELEVANT STATUTES CITED

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor orgainization shall have equal rights and privileges within such orgainization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation fees, and assessments

Except in the case of a federation of national or inter-

national labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of right to sue

No labor organization shall limit the right of any

member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Pub.L. 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522.)

§ 412. Civil action for infringment of rights; jurisdiction

Any person whose rights secured by the provisions

of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Pub.L. 86-257, Title I, § 102, Sept. 14, 1959, 73 Stat. 523.)

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

(Pub.L. 86-257, Title VI, § 609, Sept. 14, 1959, 73 Stat. 541)

No. 90-674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, *et al.*,

Petitioners,

v.

ROBERT GUIDRY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

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Attorneys for Respondent

November 13, 1990

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED

1. Do union officials' threats of violence and denial of hiring hall referrals, in retaliation for a union member's exercise of his free speech rights under section 101(a)(2) of the LMRDA, "infringe" that member's free speech rights?

2. Did the court of appeals correctly hold that damages may be awarded for emotional distress when union officials have deprived a union member of work and threatened him with physical injury in retaliation for his exercise of his right of free speech within the union?

3. Did the court of appeals correctly hold that a district court has discretion to award modest punitive damages when union officials act with "actual malice" in retaliating against political dissidents?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Respondent Robert Guidry and eleven other members of petitioner International Union of Operating Engineers Local 406 ("Local 406") sued petitioners Local 406 and four of its officers — petitioners Peter Babin III, Willard Carlock, Sr., Columbus Laird, and Don Schiro (the "local officers") — alleging violations of the duty of fair representation and the Union Members' Bill of Rights, which is Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 *et seq.* ("LMRDA"). The plaintiffs alleged that some of them had opposed the incumbent officers in intra-union

elections and in other political disputes within the union, that some of them had simply refused to contribute to the intra-union political campaigns of the incumbents, and that some of them had cooperated with criminal investigations into the officers' conduct.[1] In retaliation for this conduct, plaintiffs and their families were subjected to numerous threats of physical harm, including threats against their lives, and were blacklisted at the union hiring hall. In addition, respondent Guidry was expelled from the union, to which he had belonged since 1949, for having crossed a picket line established at a non-union contractor that employed him during the period when he was frozen out of the union hiring hall.

After a bench trial lasting several weeks, the district court entered detailed findings upholding plaintiffs' claims of physical and economic retaliation. Appendix to the Petition ("Pet. App.") at A53-A68. The court concluded that this retaliation violated the duty of fair representation ("DFR"), Pet. App. A68-A69, plaintiffs' right of free speech under section 101(a)(2) of the LMRDA, Pet. App. A70-A71, and plaintiffs' right not to be disciplined without due process under section 101(a)(5) of the LMRDA or for an improper purpose under 609 of the LMRDA. Pet. App. A71-A72. The court also held that, because the membership meeting at which respondent Guidry was expelled had been packed with supporters of petitioner Carlock, after petitioner Laird had telephoned them to ensure that they would attend to vote against respondent Guidry, his expulsion violated the "fair hearing" requiring of section 101(a)(5). Pet. App. A78.

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[1]Petitioners Carlock and Laird, among others, were convicted of various offenses, including racketeering, extortion, illegal payments from employers, and obstruction of justice. Appendix to the Petition for Writ of Certiorari at A39-A-40.

Because the district judge believed that the statute of limitations for DFR and LMRDA violations alike was six months, he based his damages awards on that time period. *Id.* A72. He awarded all of the twelve plaintiffs together almost $25,000 in back wages, including $5,310.50 for respondent Guidry, *id.* A72-A76; $58,000 in damages for mental and emotional distress caused by both the loss of livelihood and the threats of physical harm, including $20,000 for respondent Guidry; *id.* A76-A78; and punitive damages of $132,000, including $11,000 for respondent Guidry. *Id.* A79-A82. Finally, the district court ordered petitioner Local 406 to pay plaintiffs their reasonable attorney fees, both because they had acted toward plaintiffs with bad faith, and because plaintiffs' victory had conferred a common benefit on the membership as a whole that should be taxed against the union treasury. *Id.* A82-A83.

Petitioners appealed only the judgment in favor of respondent Guidry, and Guidry cross-appealed. *Id.* A11 n.1, A16. The court of appeals affirmed the district court's holdings with respect to liability, and specifically upheld the district court with respect to each of Guidry's theories: the duty of fair representation, *id.* A24 n.5, free speech under section 101(a)(2), *id.* A27 n.6, A29, A34, and discipline without due process under section 101(a)(5) and for an improper purpose under section 609. *Id.* A25-A32. In addition, the court held that, in light of this Court's intervening decision in *Reed v. UTU*, 109 S. Ct. 424 (1989), and in light of the fact that this case, like *Reed*, involved a claim under section 101(a)(2) of the LMRDA, the statute of limitations was properly one year, not six months. Pet. App. A34-A35. Accordingly, the court directed the district court to recompute both punitive and actual damages in light of the new limitations period and

other considerations discussed in its opinion. *Id.* A35-A39. However, the court reversed the award of attorney fees on the grounds that fees may be awarded for bad faith only when the bad faith is exhibited during the litigation, not where the bad faith is part of the underlying action, and that attorney fees are never available in LMRDA cases on the common benefit theory when the plaintiff receives an award of damages. *Id.* A39-A41.

Shortly after the court of appeals issued its decision, this Court decided *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989). In *Breininger*, the court held that, although denial of hiring hall referrals may violate the duty of fair representation if done in an arbitrary fashion, even retaliatory denial of referrals does not constitute "discipline" of union members under sections 101(a)(5) and 609, unless the union as an entity has taken responsibility for the action. Petitioners then sought review in this Court of the ruling below that Guidry had been disciplined; although the same damages questions as those contained in this petition were presented there as well, petitioners did not object to the court of appeals' ruling with respect to sections 101(a)(2) and 102. This Court granted certiorari and remanded solely to permit reconsideration in light of *Breininger*. Pet. App. A9.

On remand, the court of appeals, acting without the benefit of briefs from the parties, first remanded the case to the district court, directing it to decide whether the hiring hall retaliation had been authorized by the union as a collective entity. *Id.* A7-A8. Respondent, concerned that this remand order might be read to require such findings as a condition of reaffirming petitioners' liability under section 101(a)(2), sought rehearing to clarify this point. The court of appeals then revised its

ruling, making clear that the finding of liability under section 101(a)(2) in its earlier opinion remained effective, because it had not been undermined by *Breininger*. Pet. App. A4. Thus, the district court was required to reopen the question of liability only under section 101(a)(5). Pet. App. A3.

REASONS FOR DENYING THE WRIT

A. The Finding of Liability Under Sections 101(a)(1) and 101(a)(2) Does Not Conflict With Any Decision of This Court or of Any Court of Appeals.

In *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989), this Court held that, when union leaders retaliate against members for having exercised intra-union political rights, by denying them referrals from the union hiring hall, the members have a claim for violation of the duty of fair representation. The court also held, however, that, at least where the retaliation is effectuated by the union leadership for their own interests, without invoking the formal decision-making procedures of the union or imposing any stigma for having allegedly violated legitimate union rules, there is no "discipline." Accordingly, in those circumstances there can be no claim under section 101(a)(5) of the LMRDA, which requires a union to afford members due process before imposing discipline, or under section 609 of the LMRDA, which forbids discipline for having exercised rights under the LMRDA. *Id.* at 438-440. The Court expressly reserved the question of whether such retaliation would "infringe" the members' free speech rights under sections 101(a)(2) and 102 of the LMRDA, because the union member had neither alleged a violation of section 101(a)(2) in his complaint, nor presented the question as to either section in his petition for a writ of certiorari. *Id.* at 440 n.18.

Following the remand order in this case, the court of appeals in turn remanded the section 101(a)(5) issue for further consideration by the district court in light of the standard set by *Breininger*, and that issue is not at issue on this petition. Rather, the only issue on liability in the petition is whether the lower court's holdings with respect to sections 101(a)(1) and (2) were correct, issues that this Court expressly reserved in *Breininger* because the petitioner there failed to raise them.

The far broader question presented by the petition is not at issue here. Contrary to petitioners' first Question Presented, Petition at i ("Pet. i"), the court of appeals did not hold that any hiring hall discrimination is automatically actionable under sections 101(a)(1) and 101(a)(2). Rather, it upheld the violation here which involved adverse treatment at the hiring hall, as well as threats of violence, that was based on retaliation for a member's exercise of his rights under those sections, by participating in union political debates and by refusing to lend his support to the incumbents' election campaigns.

Petitioners do not point to any decision of this Court, or indeed of any court of appeals, that conflicts with that holding. As petitioners concede, the Sixth Circuit agrees with the Fifth Circuit in this regard, Pet. 5 n.3, *citing Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 123 (6th Cir. 1985). Petitioners cite only a district court opinion from within the Sixth Circuit, Pet. 6, and perform an arcane dissection of a minor dictum from this Court's opinion in *Finnegan v. Leu*, 456 U.S. 431, 435 (1982), in which the Court noted the problem that denial of membership may lead to loss of livelihood, but which petitioners would turn into a bar against redress for any sanctions that directly affect the member's livelihood. Pet. 6.

In short, petitioners have not shown either that there is any

disagreement among the lower courts about the viability of the cause of action under sections 101(a)(1) and 101(a)(2) for threats of violence or hiring hall retaliation based on the exercise of rights under those sections, or that the courts below have committed some error that is so egregious that review should be granted in the absence of a disagreement among the lower courts. Accordingly, there is no reason to review the first Question Presented.

B. The Damages Issues Raised By The Petition Involve Neither an Important Question Of Law Nor A Significant Conflict Among The Lower Courts.

1. In *IBEW v. Foust*, 442 U.S. 42 (1979), the Court held that punitive damages may not be awarded against unions for breach of the DFR, while expressly reserving the issue of whether such damages may be awarded under the LMRDA. *Id.* at 47 n.9. Justice Blackmun's concurring opinion approved of this reservation, while expressing the *fear* that the opinion might imply that punitive damages were unavailable in LMRDA cases. No Justice advocated a prohibition on punitive damages in such cases, and the circuits, both before and since *Foust*, are unanimous in approving punitive damages in some LMRDA cases. *E.g.*, *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1380 (8th Cir. 1978); *see also Petramale v. Laborers Local 17*, 847 F.2d 1009, 1013 (2d Cir. 1988). Moreover, punitive damages may be awarded in cases involving violations of civil rights under 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30 (1983), and the LMRDA is most closely analogous to section 1983, not to the DFR, the National Labor Relations Act and the other statutes on which petitioners rely.

Pet. 8-10. *Reed v. UTU*, 109 S. Ct. 621, 629-630 (1989). Accordingly, the availability of punitive damages is not a substantial question warranting this Court's review.[2]

2. Petitioners do not suggest that there is any disagreement among the lower courts about whether damages are available in LMRDA cases for emotional distress, and in fact the circuits are unanimous in upholding such damages in appropriate cases. *Bise v. IBEW Local 1969*, 618 F.2d 1299, 1305 (9th Cir. 1979); *Rodonich v. Laborers Local 95*, 817 F.2d 967, 977-978 (2d Cir. 1987); *Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 1020 (4th Cir. 1965). Petitioners try to suggest a split in the circuits by arguing for a requirement that a plaintiff first show a physical manifestation of the emotional strain. Pet. 14-15. The court below, like the Ninth Circuit cases on which it relied, agrees with the Second Circuit that emotional distress damages should not be awarded absent a showing that the union member has suffered tangible injuries. Whether loss of wages is a sufficient showing of tangible injury, or whether a doctor's testimony or the plaintiff's own testimony about sleepless nights should also be required, is scarcely a question of sufficient moment to warrant this Court's attention. Nor, indeed, does the Court have jurisdiction to decide whether a showing of physical injury is required,

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[2]Petitioners cite one case as having "questioned" the availability of punitive damages in LMRDA cases. Pet. at 11 n.9, *citing McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965). That case involved a union member's claim for lost wages incurred before his suspension from membership, which the court denied on the ground that only damages that are "directly and proximately caused" by an LMRDA violation may be awarded. Although it is not clear that McCraw was seeking punitive damages, the same court later indicated that *McCraw* implied that punitive damages would be unavailable, while simultaneously questioning the "present viability" of that aspect of *McCraw*. *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).

because petitioners did not raise this distinction in their appeal to the Fifth Circuit as a basis for overturning the award of damages for emotional distress in the two pages of their brief that dealt with that issue.[3]

Here, the lower courts found that, because he failed to kowtow to the union's political leaders, Guidry was subjected to unremitting pressure through expulsion from the union at a union meeting stacked with supporters of the incumbents, hiring hall discrimination, attempts to have him fired from the jobs he did obtain, late night telephone calls, threats of physical injury delivered face-to-face on the job, and even threats against his life. Even the Second Circuit has held, in a DFR case, that a union may be liable for emotional distress damages absent physical injury where the union's conduct was outrageous, which was certainly the case here. *Baskin v. Hawley*, 807 F.2d 1120, 1133-1134 (2d Cir. 1986). Nor is there any basis for concluding that the award here was the product of a runaway jury -- the case was tried to the bench, and Guidry received a modest award of $20,000 for emotional distress. Whatever the proper standard for claims for emotional distress under the LMRDA, this is the sort of case in which such damages ought to be available, and neither the availability of emotional distress damages, nor the question of the proper standard, warrants review here.

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[3]A copy of the entire brief, pages 41 to 43 of which address emotional distress damages, has been lodged with the Clerk.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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